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No. 86-937-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Thomas O. Robinson, Jr.

Docketed:
December 8, 1986

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Durham III, Bart C., Durham, Carolou
Perry

Entry	Date	Note	Proceedings and Orders
1	Oct 23 1986		Application for extension of time to file petition and order granting same until December 8, 1986 (Scalia, October 28, 1986).
2	Dec 8 1986	G	Petition for writ of certiorari filed.
4	Jan 9 1987		Order extending time to file response to petition until January 25, 1987.
5	Jan 24 1987		Brief of respondent Thomas O. Robinson in opposition filed.
6	Jan 28 1987		DISTRIBUTED. February 20, 1987
7	Feb 6 1987	X	Reply brief of petitioner United States filed.
8	Feb 23 1987		Petition GRANTED. *****
9	Apr 9 1987		Joint appendix filed.
10	Apr 9 1987		Brief of petitioner United States filed.
12	Apr 27 1987		Order extending time to file brief of respondent on the merits until June 3, 1987.
13	Jun 2 1987		Order further extending time to file brief of respondent on the merits until June 10, 1987.
14	Jun 4 1987		Record filed.
15	Jun 10 1987		Brief of respondent Thomas O. Robinson filed.
16	Jun 25 1987		Record filed.
17	Jul 2 1987		CIRCULATED.
18	Sep 2 1987	X	Reply brief of petitioner United States filed.
19	Aug 31 1987		SET FOR ARGUMENT. Tuesday, November 3, 1987. (3rd case).
20	Nov 3 1987		ARGUED.

**PETITION
FOR WRIT OF
CERTIORARI**

86-937 (1)

Supreme Court, U.S.
FILED

DEC 8 1986

JOSEPH F. SPANIOLO, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS O. ROBINSON, JR.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether, after defense counsel has argued in summation that the government prevented the defendant from explaining his side of the story, a prosecutor may respond in rebuttal that the defendant was free to testify had he chosen to do so.
2. Whether the "plain error" doctrine applies to errors affecting constitutional rights.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS O. ROBINSON, JR.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 794 F.2d 1132. An earlier opinion of the court of appeals (App., *infra*, 15a-27a), vacated and remanded by this Court (470 U.S. 1025 (1985)), is reported at 716 F.2d 1095.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 28a) was entered on July 9, 1986. A petition for rehearing was denied on September 9, 1986 (App., *infra*, 29a-30a). On October 28, 1986, Justice Scalia extended the time within which to file a petition for a writ of certiorari to and including December 8, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, respondent was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341 and 2.¹ Each count was in connection with a fire and subsequent insurance claim. He was sentenced to a five-year term of imprisonment, all but five months and 29 days of which was suspended in favor of a five-year term of probation.

1. The evidence at trial showed that in early 1979 respondent leased a truck stop in Guthrie, Kentucky. At that time, he purchased a \$31,000 fire insurance policy on a wrecker and the contents of the garage at the truck stop. Tr. 309-310, 317-319. Earlier in 1979, respondent had told a man whom he had asked to become a partner in the truck stop that if the business turned out to be unsuccessful, he had a large inventory and could burn it. Tr. 485-487. Throughout 1979, respondent was consistently delinquent in paying his rent, and by September 1979 his business had deteriorated significantly. Tr. 313, 359, 495, 512-513. On August 30, 1979, respondent increased the insurance coverage on the garage contents from \$31,000 to \$50,000. Two days later, on September 1, 1979, there was an explosion and fire in the garage. Respondent subsequently submitted an \$80,000 insurance claim for the loss

¹ Respondent was tried together with his wife, Aleida L. Robinson. She was convicted on one mail fraud count and was sentenced to two years' probation. The court of appeals affirmed her conviction (App., *infra*, 15a-27a). Both respondent and Mrs. Robinson were acquitted on two counts of making false statements to a bank for purposes of obtaining a loan, in violation of 18 U.S.C. 1014. At the close of the evidence at trial, the district court dismissed two other counts charging respondent with making and possessing a destructive device, in violation of 26 U.S.C. 5861.

of the wrecker and the contents of the garage and an adjoining office. Tr. 318-319, 341, 344; App., *infra*, 10a-11a.

The day after the fire, respondent's insurance agent, Aaron Williams, inspected the burned-out areas. Williams observed that tools and equipment he had previously seen in the garage were missing, that respondent's insured wrecker, which was usually parked in front of the truck stop, had been destroyed in the fire, and that respondent's uninsured race car, which was normally kept in the garage, had not been damaged. Williams also observed that the office area of the garage did not contain the remains of a color television, an adding machine, or a copying machine that respondent later claimed he had lost in the fire. Tr. 322-323. Shortly thereafter, investigators discovered that a large quantity of fire accelerant had been poured on the floor where the fire had started and that a desk in the office area contained no files or debris of any kind. Tr. 442-443, 457-458, 476-484; App., *infra*, 11a.

During the next several weeks, respondent asked salesmen with whom he dealt to prepare false invoices showing that he had purchased an air compressor and more than \$10,000 worth of tires, so that he could submit those items as part of his proof of loss to the insurance company. Tr. 410-417, 429-430; GXs. 24, 25; App., *infra*, 11a.

Approximately a year later, respondent's house in Clarksville, Tennessee, was heavily damaged by arson about an hour after respondent had left the premises with a large U-Haul truck filled with most of his household furnishings. Tr. 50-51, 252-260, 267. Firefighters and investigators inspected the premises shortly after the blaze had been extinguished. They discovered that a large, two-handled cooking pot containing gasoline had been left on a lit stove, that an electric fan had been left running near an air vent, and that "rapid-rise" gasoline had been spread

throughout the house. They also determined that the doors and windows were locked, that the house was sparsely furnished, and that there was nothing in most of the dresser drawers or closets. Tr. 59-60, 64-65, 70-74, 78-85, 91, 99-107, 131-132. The authorities later learned that the home security system had been disconnected prior to the blaze. Tr. 154-156, 214; App., *infra*, 11a-12a.

During the month preceding the fire at his home, respondent had packed family belongings, moved household furnishings from his house, and held a yard sale that was attended by several neighbors. Tr. 182, 190, 202, 212, 226, 252. Two or three days before the fire, respondent began loading his household furnishings into a large U-Haul truck with the help of a 17-year-old neighbor, Christopher Edwards. Edwards also helped respondent move older furniture and appliances from the garage into the house. Tr. 257. The day before the fire, Edwards' 11-year-old brother saw respondent draining gasoline from his race car into a large, two-handled cooking pot. Tr. 232-233. During the early morning hours immediately before the fire, Edwards helped respondent load the truck with clothing, beds, a grandfather clock, a dining room set, a master bedroom set, a microwave oven, and a double-door refrigerator-freezer filled with meat. Tr. 256-266. Edwards remained with respondent and his family until sometime after 3:00 a.m., when they were ready to leave for California. While Edwards and respondents' family waited outside, respondent remained alone in the house for five to ten minutes. After respondent left the house, he and his family departed in the U-Haul truck and an automobile. An hour later, neighbors discovered that respondent's house was on fire. Tr. 214, 227, 230, 266-267; App., *infra*, 12a-13a.

Respondent subsequently contacted the company that insured the Clarksville house. He stated that his family had left Clarksville to vacation in California, but that they

had decided to remain there because of the fire. Tr. 135-137. He provided the company with a list of property allegedly lost in the blaze. Tr. 137-139; GX 16. Respondent thereafter mailed the insurance company a proof of loss statement and a claim for \$200,000, including a \$106,500 personal property claim. Tr. 137-140; GX 18. Property that respondent had included in his insurance claim was later discovered by authorities in his California residence. Tr. 177-178, 183-185, 203, 215-219, 235-243, 260-266, 381; App., *infra*, 13a.²

The evidence for the defense consisted of the testimony of two of respondent's children (Tr. 515-562, 596-609) and a neighbor (Tr. 562-589) concerning the events surrounding the fires. In addition, respondent called a business associate, who testified that respondent had been current in his business dealings. Tr. 589-596. Neither defendant testified. App., *infra*, 13a.

2. Petitioner's attorney began his closing argument by contending that the government had breached its duty to be fair to the accused and to "play[] straight" with the jury. Tr. 658. He repeatedly returned to that theme, arguing that the government had unfairly "filtered" the evidence and had used a particular witness in order to "imply something sinister" about respondent's conduct. Tr. 662, 667-668, 674, 676. In addition, five different times in his summation defense counsel charged that the government had unfairly denied respondent an opportunity to "explain" his actions. App., *infra*, 1a-2a. Near the conclusion of his argument, counsel stated (Tr. 671-672):

Now, would you like to get indicted for that, without the Government being fair, and being able to

² Tools that respondent had removed from the truck stop garage prior to the fire there were also discovered in respondent's California residence. Tr. 368-372.

explain, have him explain before you, members of your own community, rather than before the agents? [3]

Defense counsel also attempted to imply that there were weaknesses in the prosecution's case by pointing out the absence of evidence of "more situations where there have been false claims, rather than one or two for Kentucky[]" (Tr. 676). Counsel made that argument even though the prosecution had attempted unsuccessfully, on several occasions, to introduce precisely that sort of evidence. (Tr. 141-148, 207-208, 351-352.⁴)

After the defense summation, the prosecutor objected to defense counsel's argument that the government had not given respondent a chance to "explain." He requested leave to rebut that contention, arguing that the defense had "opened the door" on that issue. Tr. 680-681. Despite ample opportunity to defend his actions or to object to the proposed rebuttal, defense counsel remained silent. The

³ Defense counsel made other comments in a similar vein:

By the way, all those statements, I don't know how many statements we heard of Mr. Robinson, they were all about the arson. Did they ever give him a chance to explain about these sorts of things, about mail fraud? [Tr. 670].

Did they ever give this man an opportunity in their many, many statements they took at the time to say "Well, I had two bedroom sets[]" [Tr. 670].

* * * * *

When he came to Tennessee in October, or shortly after the fire, within a month or so, they interviewed him about the arson.

* * * * * They never gave him a chance to explain [Tr. 670-671].

* * * * *

Now, here is what the Government, to be fair with the jury, should have done. They should have taken those items in the Kentucky inventory and just proved them. Why let the defendant disprove them, give him an opportunity to explain? [Tr. 674].

⁴ Defense counsel also argued that the jury could not draw any adverse inference from respondent's failure to take the stand (Tr. 678-679).

district court ruled that the prosecutor could answer respondent's contention that he had been afforded no opportunity to explain. The court stated (Tr. 681):

Yes. Mr. Washko, I will tell you what, the Fifth Amendment ties the Government's hands in terms of commenting upon the defendants' failure to testify. But that tying of hands is not putting you into a boxing match with your hands tied behind your back and allowing him to punch you in the face.

That is not what it was intended for and not fair. I will let you say that the defendants had every opportunity, if they wanted to, to explain this to the ladies and gentlemen of the jury.

We might get reversed on it. Mr. Durham opened the door not less than four times in his argument on that question. I will let you comment on it in response.

Defense counsel made no objection. App., *infra*, 2a.⁵

In accordance with the ruling he had obtained from the court, the prosecutor began his closing argument with a rebuttal to the defendant's attack on the government's conduct, including the following (Tr. 685):

[Defense counsel] has made comments to the extent the Government has not allowed the defendants an opportunity to explain. It is totally unacceptable.

He explained himself away on tape right into an indictment. He explained himself to the insurance investigator, to the extent that he wanted to.

⁵ The prosecution also sought permission to inform the jury that the government, contrary to defense assertions, had attempted to bring in evidence of other false claims (Tr. 682). Defense counsel objected to that request, and it was denied (Tr. 682-683).

He could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain.

Defense counsel made no objection to those remarks and did not request any cautionary instructions. The trial court later instructed the jury that a defendant has no burden to produce any evidence and that "no inference whatever may be drawn from the election of a defendant not to testify" (Tr. 694). Defense counsel stated that they had no objection to the court's instructions. Tr. 719-720; App., *infra*, 2a-3a.

3. The court of appeals reversed (App., *infra*, 15a-27a). It held that the prosecution does not have a right to make "direct comment on a defendant's failure to testify * * *, even if defense counsel has baited the prosecutor" (*id.* at 20a). Moreover, the court held that the error was not cured by the trial court's jury instructions and that, although the government's "evidence is strong," the error was not harmless beyond a reasonable doubt (*id.* at 6a, 9a).⁶

4. On March 4, 1985, this Court vacated the judgment and remanded the case with instructions to reconsider the decision in light of *United States v. Young*, 470 U.S. 1 (1985). See 470 U.S. 1025 (1985). On remand, the court of appeals adhered to its prior judgment (App., *infra*, 1a-13a). The court first held that the prosecutor's remarks constituted "a clear violation of the defendant's constitutional right not to testify" (*id.* at 3a). The court next distinguished *Young*, holding that the government's summation amounted to plain error. The court reasoned that it was freer to find plain error here because unlike in

⁶ The court of appeals affirmed Mrs. Robinson's conviction on the ground that the prosecutor's remarks were a reference only to respondent's failure to testify and thus did not taint the fairness of her conviction (App., *infra*, 25a-27a).

Young—which involved only "ethical" violations—the prosecutor in this case had violated respondent's constitutional rights (*id.* at 5a-6a). Moreover, the court noted that the prosecutor's argument in *Young* had focused on the prosecutor's credibility, while in this case the prosecutor's argument had "directly placed the *defendant's* credibility into issue" (*id.* at 8a (emphasis in the original)). Finally, the court noted that the evidence in this case, "though substantial, was not as overwhelming as in *Young*," a conclusion that the court drew from "[t]he fact that the jury did not find [respondent] guilty on all counts" (*ibid.*). The court of appeals concluded that because it could not find the prosecutor's remarks harmless beyond a reasonable doubt, plain error had been committed (*id.* at 9a).

Judge Cohn dissented. He agreed that the prosecutor's summation was improper, but he concluded that the evidence at trial was too substantial to warrant a finding that the summation had influenced the jury. He noted that the jury's failure to convict respondent on certain charges suggested that it had not been improperly swayed by the prosecutor's argument. He also expressed doubt that the plain error standard for constitutional violations in summations should be different from the standard applicable to any other violation at trial to which no objection has been made. App. *infra*, 10a.

REASONS FOR GRANTING THE PETITION

Respondent's convictions were reversed because of a comment made by the prosecutor during rebuttal argument. The comment was in direct response to defense counsel's contention that the prosecution had unfairly denied respondent an opportunity to "explain" his actions. Before making the comment, the prosecutor secured a ruling from the district court, out of the presence of the jury. Although defense counsel did not at any time object to the prosecutor's remarks, the court of appeals nonetheless

found the prosecutor's comments to be reversible error. The court held, first, that the prosecutor's remarks constituted "a clear violation" of *Griffin v. California*, 380 U.S. 609 (1965). Second, the court found that the error constituted "plain error" that could be noticed even absent an objection by the defense.

The decision below raises two issues of considerable and recurring significance. By applying the rule in *Griffin* to the prosecutor's rebuttal remarks, the court of appeals wrenched that case from its factual and legal context. Moreover, the court of appeals' misapplication of the *Griffin* rule is symptomatic of a wider confusion among the circuits generally about the appropriate scope of *Griffin*. This case presents a proper setting in which to resolve that confusion.

In addition, the court of appeals erred in assuming that it had greater authority to notice a constitutional violation—such as the purported *Griffin* violation—than a non-constitutional violation of the sort involved in *United States v. Young*, 470 U.S. 1 (1985). Nothing in Fed. R. Crim. P. 52(b) or in this Court's treatment of the plain error rule in *Young* contemplates such a distinction. Moreover, distinguishing between constitutional and non-constitutional errors in applying the plain error rule overlooks the purposes served by the contemporaneous objection rule, to which Rule 52(b) is a narrow exception. Because the circuits are divided on whether Rule 52(b) incorporates a more generous standard of review for constitutional errors, review by this Court is warranted.

1. a. In *Griffin v. California*, 380 U.S. 609 (1965), the defendant was tried for first-degree murder in a state that permitted the prosecutor to comment upon the defendant's failure to explain or deny any evidence offered against him at trial. When the defendant did not testify, the prosecutor asked the jury to treat the defendant's silence at trial as substantive evidence of his guilt. The trial

court added considerable force to the prosecutor's argument by instructing the jury that a defendant "can reasonably be expected to deny or explain * * * facts within his knowledge," and that if he "fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence" (380 U.S. at 610).

This Court reversed Griffin's conviction. To permit comments of this sort, the Court held, would "allow[] the State the privilege of tendering to the jury for its consideration the failure of the accused to testify" (380 U.S. at 613). Such a practice "solemnizes the silence of the accused into evidence against him" (*id.* at 614). Moreover, the Court held, comment on the failure of a defendant to testify "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Ibid.*

Not every remark by a prosecutor that can imaginably be called a "comment on silence" is proscribed by *Griffin*. The Court made that point clear in *Lakeside v. Oregon*, 435 U.S. 333 (1978). There, the Court held that a defendant's rights under *Griffin* were not violated when the trial court, over the defendant's objection, instructed the jury not to draw any adverse inference from the defendant's failure to testify. The defendant, who had not wished the trial court to refer at all to his failure to take the stand, argued—much as the court of appeals held in this case—that *Griffin* forbids *any* comment on silence. The Court disagreed. "[F]rom even a cursory review of the facts and the square holding of the * * * case," the Court noted, "the Court [in *Griffin*] was * * * concerned only with *adverse* comment, whether by the prosecutor or the trial judge" (435 U.S. at 338-339). More importantly, the Court added, the scope of *Griffin* cannot be divorced from the Fifth Amendment premises that animated that decision. A necessary element of compulsory self-incrimination, the

Court noted, "is some kind of compulsion" (435 U.S. at 339). The Court explained that in *Griffin*, "unconstitutional compulsion was inherent in a trial where prosecutor and judge were free to ask the jury to draw adverse inferences from a defendant's failure to take the witness stand" (*ibid.* (footnote omitted)). But not every comment relating to the defendant's failure to testify exerts that same kind of pressure; because a judge's instruction that the jury must draw no adverse inference from the defendant's exercise of his privilege not to testify does not put pressure on the defendant to testify, the Court held that giving that instruction did not violate *Griffin*.⁷

The question whether a prosecutor's remarks are proscribed by *Griffin* also depends on the context in which they are made. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the defendant challenged as a violation of *Griffin* a prosecutor's remarks that characterized the government's evidence as "unrefuted" and "uncontradicted." This Court held that the remarks did not violate the rule in *Griffin*, because defense counsel himself had focused the jury's attention on defendant's failure to testify. When viewed against that background, the Court concluded, the prosecutor's argument did not violate the principles of *Griffin*.

⁷ In other cases as well, this Court has refused to push *Griffin* to the limits of its logic. See, e.g., *Baxter v. Palmigiano*, 425 U.S. 308, 317, 319 (1976) (the rule in *Griffin* does not apply during prison discipline proceedings). See also *United States v. Hasting*, 461 U.S. 499, 506 n.4 (1983); *id.* at 515-516 (Stevens, J., concurring) ("the protective shield of the Fifth Amendment should [not] be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case"). The Court has applied the rule in *Griffin* only where, as in *Griffin* itself, the prosecutor had asked the jury to infer the defendant's guilt from his failure to testify. See, e.g., *Fontaine v. California*, 390 U.S. 593 (1968); *Anderson v. Nelson*, 390 U.S. 523 (1968); *Chapman v. California*, 386 U.S. 18 (1967).

The court of appeals in the present case overlooked these limitations on the scope of *Griffin*. By holding that the prosecutor had violated *Griffin* simply by referring to petitioner's silence, the court of appeals ignored the principle that a comment violates *Griffin* only if it asks the jury to treat a defendant's failure to testify as evidence of his guilt. In this case, the prosecutor did not ask the jury to infer respondent's guilt from his failure to testify at trial. Indeed, the prosecutor did not even comment on Robinson's *failure* to testify; he commented on his *freedom* to testify, pointing out, in response to defense argument, that the government had not prevented the defendant from telling his side of the story. That is simply not the kind of "comment" proscribed by *Griffin*.⁸

⁸ The court of appeals also lost sight of the distinction, repeatedly emphasized by this Court, between what is permissible evidence and argument in the government's *direct* case (or opening summation) and what is permissible evidence and argument in *rebuttal*. In a variety of contexts the Court has stressed that evidence, or arguments, that may not be proper on direct may become appropriate when, for example, the defendant testifies and puts new matters in issue. See, e.g., *Harris v. New York*, 401 U.S. 222 (1971) (government may impeach a testifying defendant with confessions taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Jenkins v. Anderson*, 447 U.S. 231 (1980) (government may impeach a testifying defendant with his failure to tell his exculpatory story prior to his arrest); *Walder v. United States*, 347 U.S. 62 (1954) (illegally seized evidence may be used as impeachment material); and *Tennessee v. Street*, 471 U.S. 409 (1985) (government may offer into evidence a co-defendant's confession, otherwise inadmissible under *Bruton v. United States*, 391 U.S. 123 (1968), in light of defendant's testimony). These cases make clear that the rules that constrain the government in its direct case do not apply, in haec verba, to matters of rebuttal and impeachment. If the law were otherwise, the Court has held, "[t]he shield provided by [constitutional decisions could] be perverted into a license to use perjury by way of a defense" (*Harris*, 401 U.S. at 226). Only by giving the government additional leverage to respond in rebuttal can the jury discharge its function of "evaluating the truth of [a defendant's] testimony" (471 U.S. at 415).

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b. The court of appeals' misunderstanding of *Griffin* is symptomatic of a wider confusion among the courts of appeals about the scope and proper application of the case. Over the years the rule in *Griffin* has been expanded by some courts into a rule that forbids a prosecutor even from characterizing the evidence at trial as "uncontradicted" or "unrefuted." The First Circuit, purportedly under the authority of *Griffin*, has flatly prohibited prosecutors from describing the government's proof in these terms. See, e.g., *United States v. Skandier*, 758 F.2d 43, 44 (1st Cir. 1985) ("[f]or twenty years we have held it reversible error to state baldly that the government's evidence was uncontradicted"); *United States v. Cox*, 752 F.2d 741, 745 (1st Cir. 1985); *Desmond v. United States*, 345 F.2d 225, 227 (1st Cir. 1965). The Seventh Circuit has imposed the same restriction, at least in cases in which the defendant may be the only witness who could have "contradicted" the government's proof. See, e.g., *United States ex rel. Burke v. Greer*, 756 F.2d 1295, 1300-1301 (7th Cir. 1985); *United States v. Wilkins*, 659 F.2d 769, 774 (7th Cir.), cert. denied, 454 U.S. 1102 (1981); *United States v. Poole*, 379 F.2d 645, 649 (7th Cir. 1967) (error to describe evidence as "uncontradicted" even where a witness other than the defendant could have contradicted it). Several other courts have imposed similar restrictions, again relying on *Griffin*. See, e.g., *Raper v. Mintzes*, 706 F.2d 161, 164-167 (6th Cir. 1983); *Runnels v. Hess*, 653 F.2d 1359, 1361-1362 (10th Cir. 1981); *United States v. Sanders*, 547 F.2d 1037, 1042-1043 (8th Cir. 1976), cert. denied, 431 U.S. 956 (1977).

Other circuits, reading *Griffin* as it was intended, have rejected this broad construction of the case. See, e.g., *United States v. Damsky*, 740 F.2d 134, 140-141 (2d Cir.), cert. denied, 469 U.S. 918 (1984); *United States v. Downs*,

615 F.2d 677, 679 (5th Cir. 1980); *United States v. Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976), cert. denied, 434 U.S. 819 (1977) ("We have repeatedly held that the prosecutor may comment upon the defense's failure to contradict the government's case.").⁹

We submit that the expansive reading of *Griffin* to prohibit a prosecutor from characterizing evidence as "uncontradicted" is mistaken and reflects a pervasive misunderstanding of the intended scope of that case. While the rule in *Griffin* was designed to reduce the pressures on a defendant to testify, the rule cannot fairly be read to shield the defendant from all the consequences of his failure to take the stand. The government, which bears the burden of proof beyond a reasonable doubt, should not be prohibited from describing its proof at trial as uncontradicted simply because the absence of contradiction results in part from the defendant's failure to testify. Otherwise, as Justice Stevens observed in *United States v. Hasting*, 461 U.S. at 515-516, "the protective shield of the Fifth Amendment [w]ould be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." See also *United States v. Rodriguez*, 556 F.2d 638, 642 (2d Cir. 1977), cert. denied, 434 U.S. 1062 (1978). This case presents an appropriate opportunity in which to resolve the confusion among the circuits over the proper scope to be accorded to the rule in *Griffin*.

⁹ The state courts are in similar disarray on whether *Griffin* should be read to preclude prosecutors from characterizing the government's proof as "uncontradicted." See, e.g., *Todd v. State*, 598 S.W.2d 286, 294 (Tex. Crim. App. 1980); *People v. Ganter*, 56 Ill. App. 3d 316, 326, 371 N.E.2d 1072, 1079 (1977); *State v. Messinger*, 8 Wash. App. 829, 840, 509 P.2d 382, 390 (1973), cert. denied, 415 U.S. 926 (1974); *Ross v. State*, 268 Ind. 471, 474, 376 N.E.2d 1117, 1118 (1978), cert. denied, 439 U.S. 1080 (1979).

2. After the Court remanded this case with instructions that it be reconsidered in light of *United States v. Young*, 470 U.S. 1 (1985), the court of appeals adhered to its earlier judgment. It distinguished *Young* in part on the ground that the summation in *Young* violated an *ethical* norm, while the summation in this case abridged a *constitutional* principle (App., *infra*, 5a-6a).¹⁰ That distinction has no basis in the *Young* decision and is in conflict with this Court's application of the contemporaneous objection rule. Because there is a conflict among the circuits as to whether plain error should be more readily noticed for constitutional claims, review by this Court is warranted.

a. The *Young* case involved a challenge to a prosecutor's rebuttal summation. Prior to the rebuttal, defense counsel had argued that not even the prosecution believed the defendant to be guilty, and that the only person who had behaved with integrity in the case was the defendant. In response, the prosecutor denied counsel's claim that no one sitting at the government table believed the defendant

¹⁰ The court of appeals also distinguished *Young* on the ground that in that case the prosecutor had invoked his own credibility whereas here the prosecutor had somehow impugned the respondent's credibility (App., *infra*, 8a). There is no basis for this distinction. Nothing in the prosecutor's summation in this case adverted, even obliquely, to respondent's credibility. The court of appeals also held (*ibid.*) that the evidence in this case was not as overwhelming as in *Young*, a conclusion that the court derived from the jury's failure to convict respondent on all charges. This is a plain misreading of *Young*. In *Young*, as in this case, the jury acquitted the defendant of one of the charges, a fact that this Court regarded as "reinforc[ing] our conclusion that the prosecutor's remarks did not undermine the jury's ability to view the evidence independently and fairly." 470 U.S. at 18 n.15. Other circuits have made the same point. See, e.g., *United States v. Mandelbaum*, 803 F.2d 42, 46 (1st Cir. 1986); *United States v. Carson*, 702 F.2d 351, 368 (2d Cir.), cert. denied, 462 U.S. 1108 (1983); *United States v. Matalon*, 445 F.2d 1215, 1219 (2d Cir.), cert. denied, 404 U.S. 853 (1971).

to be guilty. The prosecutor also offered his opinion that defendant's actions constituted a fraud and advised the jurors that, in his opinion, they would not be doing their job if they acquitted the defendant. At no time did defense counsel object. 470 U.S. at 3-6.

Because no objections had been made, the Court held that the rebuttal argument must be reviewed under the "plain error" doctrine embodied in Fed. R. Crim. P. 52(b). That rule, the Court observed, "authorizes the Courts of Appeals to correct only 'particularly egregious errors' " (470 U.S. at 15, quoting *United States v. Frady*, 456 U.S. 152, 163 (1982))—in particular, "those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings' " (470 U.S. at 15, quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

Nowhere in *Young* did this Court intimate that the plain error rule applies differently when constitutional rights are implicated. Indeed, the Court made clear that "[a] *per se* approach to plain-error review is flawed" (470 U.S. at 17 n.14) and that, instead, " 'each case necessarily turns on its own facts' " (*id.* at 16, quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 240 (1940)). How an error is labeled—constitutional or otherwise—is beside the point. Rather, to trigger appellate review under Rule 52(b), the Court held, an error "must be more than obvious[,] * * * affect[] 'substantial rights,' * * * [and] ha[ve] an unfair prejudicial impact on the jury's deliberations" (470 U.S. at 17 n.14).¹¹

¹¹ Nothing in the language of Rule 52(b) warrants the distinction drawn by the court of appeals. Rule 52(b) permits a reviewing court to notice "[p]lain errors or defects affecting substantial rights" even though no objection has been made at trial. On its face, the rule makes no distinction between constitutional and non-constitutional claims; depending on the nature of the right and the particular factual setting, constitutional or non-constitutional errors may be substantial or insubstantial.

The distinction drawn by the court of appeals also mistakes the nature of the plain error rule, which stands as a narrow exception to the more basic principle that to preserve an issue—constitutional or otherwise—a contemporaneous objection must be lodged. The contemporaneous objection rule serves obvious and salutary purposes. Timely objection affords both the trial court and the prosecutor the opportunity to consider, and perhaps rectify, their decisions and trial tactics while it is still possible to do so. *Henry v. Mississippi*, 379 U.S. 443, 448 (1965); *United States v. Indiviglio*, 352 F.2d 276, 280 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966). If a defendant prevails on his objections, he may avert prejudicial error and thus enhance his chances to secure an acquittal from the jury. And if he nonetheless is convicted, his timely objections will have defined the points to be reviewed on appeal and will have obviated the need to reverse a conviction simply because an error that was susceptible of correction was not perceived at trial.¹²

Any distinction between constitutional and non-constitutional error would disserve these purposes of the contemporaneous objection rule. Simply because evidence or argument is challenged on constitutional grounds should not relieve counsel of the duty to bring that objection to the immediate attention of the trial court. There is nothing about the label “constitutional” that reduces the importance of allowing the trial judge to correct error before it affects the jury’s verdict. Nor does the fact that

¹² As the Court has observed, “[a] contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest [and] . . . [i]t enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question. . . . A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation.” *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977).

an objection can be characterized in constitutional terms diminish the value of framing that issue clearly, both for resolution at the trial level and, if need be, for appellate review.¹³

The court of appeals’ distinction also cannot be squared with this Court’s application of the contemporaneous objection rule and the plain error exception to that rule. The Court has stated plainly that “[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it” (*Yakus v. United States*, 321 U.S. 414, 444 (1944)). Accord *Jennings v. Illinois*, 342 U.S. 104, 108-109 (1951). Thus, the Court has never hesitated to apply the contemporaneous objection rule, despite the fact that a constitutional claim was thereby foreclosed. See, e.g., *Levine v. United States*, 362 U.S. 610, 619 (1960) (“[t]he continuing exclusion of the public in this case is not to be deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom at the final stage of the proceeding, thereby giving notice of the claim now made and affording the judge an opportunity to avoid reliance on it”); *Segurola v. United States*, 275 U.S. 106, 111-112 (1927) (Fourth Amendment

¹³ The failure to make a contemporaneous objection is particularly striking in the present case. At the close of defense counsel’s summation, the prosecutor moved to make two distinct arguments in rebuttal: first, that the government had not kept respondent from testifying; and second, that the government had attempted at trial to offer certain evidence whose absence from the case defense counsel had assailed in his summation. Defense counsel objected only to the second proposed argument, and the trial judge sustained the objection. Conspicuously, counsel made no objection to the prosecutor’s request that he be allowed to rebut the contention that the government had kept respondent from telling his side of the story.

challenge to the seizure of evidence waived in the absence of a timely motion to suppress). See also *On Lee v. United States*, 343 U.S. 747, 749 n.3 (1952).

b. While neither the language nor the policies of Rule 52(b) suggest a distinction between constitutional and non-constitutional objections, several courts of appeals have endorsed that distinction in applying the plain error rule. See, e.g., *United States v. Shue*, 766 F.2d 1122, 1132 (7th Cir. 1985); *United States v. Smith*, 700 F.2d 627, 633 (11th Cir. 1983); *United States v. Tobias*, 662 F.2d 381, 388 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982); *United States v. Brown*, 555 F.2d 407, 420 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978). Other circuits make no such distinction. See, e.g., *United States v. Ferguson*, 776 F.2d 217, 223 (8th Cir. 1985), cert. denied, No. 85-1254 (Feb. 24, 1986); *United States v. Bayko*, 774 F.2d 516, 518 (1st Cir. 1985); *United States v. Huckaby*, 698 F.2d 915, 920 (8th Cir. 1982), cert. denied, 460 U.S. 1070 (1983) (“[g]enerally, constitutional challenges not raised before the trial court are not cognizable on appeal unless they constitute plain error”); *United States v. Sachs*, 679 F.2d 1015, 1018 (1st Cir. 1982) (“[a]ppellant’s newly-raised [constitutional] defenses were known to him at the time of trial; failure to articulate them at any time during those proceedings must constitute a waiver”); *United States v. Popejoy*, 578 F.2d 1346, 1350 (10th Cir.), cert. denied, 439 U.S. 896 (1978) (“[w]e believe that evidentiary objections with a constitutional footing can be waived in a case like this by failure to object, particularly where the basic factual and legal predicate for them was available”); *Shaw v. United States*, 403 F.2d 528, 530 (8th Cir. 1968) (“barring plain error, we will not notice errors raised for the first time in the appellate court, including errors involving a defendant’s constitutional right”); *Indiviglio*, 352 F.2d at 280 (“[f]ederal courts, including the Supreme Court, have declined to notice errors not objected to below even

though such errors involve a criminal defendant’s constitutional rights”). See also *United States v. Byers*, 740 F.2d 1104, 1130 n.38 (D.C. Cir. 1984) (Robinson, J., concurring in the judgment).

The court of appeals in this case cast its lot with those courts that have relaxed the requirements of Rule 52(b) in order to reach constitutional claims that were never raised as objections at trial. Further review by this Court is warranted to address the conflict among the circuits on this issue and to ensure compliance with the principles underlying the contemporaneous objection requirement and Rule 52(b).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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DECEMBER 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5366

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS O. ROBINSON, JR., AND ALEIDA ROBINSON,
DEFENDANTS-APPELLANTS

Decided July 9, 1986

Before KEITH and WELLFORD, Circuit Judges, and
COHN, District Judge.*

WELLFORD, Circuit Judge.

Following this court's reversal of the conviction of defendant, Thomas O. Robinson, Jr., 716 F.2d 1095 (6th Cir.1983), the Supreme Court vacated that judgment and remanded the cause "for further consideration in light of" *United States v. Young*, _____ U.S. _____, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). The parties have submitted supplemental briefs in respect to the remand and our further consideration of this case.

Although a more detailed review of the evidence underlying defendant's conviction may be found in our previous decision at 716 F.2d 1095, we will focus on remand upon the events surrounding the prosecutor's misconduct.

In closing argument the prosecutor summarized the evidence against defendants. The attorneys jointly representing defendants divided their summation. The first attorney focused upon asserted weaknesses in the

*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

government's case. The other defense attorney, however, began his closing argument by contending that the government had breached its duty of fairness to the accused and had failed to "play[] straight with the jury." He further claimed that the government unfairly filtered the evidence. Additionally, defense counsel charged five different times that the government had unfairly denied Robinson an opportunity to "explain" his actions.

After the defense summation, out of the jury's presence, the prosecutor then objected to defense counsel's contention in summation that the government had not given defendant a chance to "explain." He requested leave to rebut that contention, arguing that the defense had "opened the door" on that issue. Despite ample opportunity to defend his actions or to object to the proposed rebuttal, defense counsel remained silent. The district court, considering both the prosecution's right to reply and the accused's privilege against compulsory self-incrimination, ruled that in rebuttal the prosecutor could answer defendant's contention that he had been afforded no opportunity to explain.

In accordance with the ruling he had obtained from the court, the prosecutor began his closing argument with a rebuttal to defense counsel's attack on the government's conduct. Initially the prosecutor limited rebuttal to statements that defendant had numerous opportunities to explain his conduct during the government's investigation. He concluded, however: "He could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain." Defense counsel made no objection to those remarks and did not request any cautionary instruction. The trial court later instructed the jury that a defendant has no burden to produce any evidence and that "no inference whatever may be drawn from the election of a defendant not to testify." Defense counsel stated they

had no objections to the court's instructions. Defendant, Thomas Robinson was subsequently convicted on two counts.

The prosecutor's comment upon the defendant's failure to testify was a clear violation of the defendant's constitutional right not to testify. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); see also *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). However, such error does not merit reversal per se and where defense counsel failed to make a contemporaneous objection to the error, as in this case, the conviction may be reversed only if it constituted plain error. *United States v. Young*, _____ U.S. _____, 105 S.Ct. 1038, 1042, 84 L.Ed.2d 1 (1985); *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936); Fed. R.Crim.P. 52(b).

In *Young*, the prosecutor, in response to improper remarks by defense counsel in closing argument, improperly and unethically stated his personal conviction that defendant was guilty of the charged crime. Defense counsel failed to object to his opponent's comments. The Tenth Circuit subsequently reversed the conviction, concluding that the prosecution's prejudicial statements "were sufficiently egregious as to constitute plain error." *United States v. Young*, 736 F.2d 565, 570 (10th Cir.1983). Eight Justices agreed that the Tenth Circuit's reversal of Young's conviction could not stand. Five Justices held that "the argument of the prosecutor, although error, did not constitute plain error warranting the Court of Appeals to overlook the failure of the defense counsel to preserve the point by timely objection." *Young*, 105 S.Ct. at 1049 (emphasis added).

In addressing the possibility of plain error, Chief Justice Burger writing for the Court observed that "a reviewing court cannot properly evaluate a case except by viewing such a claim against the entire record." *Id.* at 1047. Based

upon the record, to satisfy the plain error standard, the claimed error must “not only seriously affect[] ‘substantial rights,’ ” but it must also have “an unfair prejudicial impact on the jury’s deliberations.” *Id.* n. 14.

In reviewing the record, the majority approved application of an “invited response” doctrine. The majority stated that a “Court must consider the probable effect the prosecutor’s response would have on the jury’s ability to judge the evidence fairly.” *Id.* at 1045. In making that determination, the conduct of defense counsel as well as the nature of the prosecutor’s response are relevant. *Id.* Thus, where a prosecutor’s comments are a reasonable response to defense counsel’s provoking remarks, a conviction should not be reversed.

Finding the prosecutor’s statement to be error, the issue became “whether the prosecutor’s ‘invited response’ taken in context unfairly prejudiced the defendant.” *Id.* Reviewing the effect of the error upon the record as a whole, the Court observed several key facts. First, the Court noted that the prosecution prefaced its erroneous statements by emphasizing that it was responding to defense counsel’s attacks. Although condemning the government for such misconduct, the Court found that the jury would have been able to understand the statements in context as a response to a defense attack. Second, the Court found the government’s vouching for its case not to suggest that the government was relying upon facts outside of evidence presented at trial. Finally, the Court examined the overwhelming amount of evidence against defendant, finding little to support defendant’s theory and concluded:

Under these circumstances, the substantial and virtually uncontradicted evidence of respondent’s willful violation provides an additional indication that the prosecutor’s remarks, when reviewed in context, cannot be said to undermine the fairness of the trial and contribute to a miscarriage of justice.

On this record, we hold that the argument of the prosecutor, although error, did not constitute plain error warranting the Court of Appeals to preserve the point by timely objection; nor are we persuaded that the challenged argument seriously affected the fairness of the trial. Accordingly, the judgment of the Court of Appeals, ordering a new trial based on the prosecutor’s argument, is reversed.

Id. at 1049.

We are called upon to consider the effect of *Young* in reconsidering our judgment in this cause. *Young* was concerned about prosecutorial misconduct in disregard of *ethical* principles by the prosecutor’s improper injection of his personal view of defendant’s intent and his ultimate guilt in response to his adversary’s argument that “not a person in this courtroom . . . think[s] that Billy Young intended to defraud. . . .” *Id.* at 1041. There was also a prosecutor’s call for the jury to “do its job” as jurors and thus not acquit defendant Young. Courts have concern about a prosecutor’s injection of his personal views about a defendant’s guilt because the prosecutor is not only an advocate but he is also “an administrator of justice.” ABA Standards for Criminal Justice 3-1.1(b) (2d ed. 1980). The jury may view the prosecutor as possessing some kind of special “inside information” that leads him to a personal view of guilt; thus the prosecutor is ethically precluded from an attempt to take advantage of his special position as the representative of the people and an administrator of the justice system within his sphere of authority. According to *Young*, violation of this ethical duty not to express personal views concerning the effect or weight of evidence and/or the guilt of the defendant may, nevertheless, not constitute “plain error” requiring a reversal of conviction when there has been no contemporaneous objection by defendant’s counsel.

In the instant case, on the other hand, there was a prosecutorial comment upon the exercise by Robinson of his constitutional right not to testify made in response to defense counsel's repeated assertion in final argument that the government gave Robinson no "chance to explain" his actions.¹ The district court allowed the government to respond in argument "that the defendants had every opportunity, if they wanted to, to explain this." If the prosecutor's comments had been limited to responding that the defendant, Robinson, was given the opportunity *throughout the investigation* to explain his position without directly pointing out his failure to take the witness stand, we would find little difficulty in deciding that there was no plain error. The trial court, however, without objection by the defendant, permitted the United States Attorney to respond in closing argument that Robinson had made no explanation *before the jury* about evidence supporting the indictment charges. This was permitted by the district judge, in an action taken before the Supreme Court's analysis in *Young*, as an "invited error" response to unfair comments repeatedly made by defendant's counsel in his argument.²

¹ See *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *Wilson v. United States*, 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650 (1893); *Angel v. Overberg*, 682 F.2d 605 (6th Cir.1982).

² The district court exceeded proper bounds in permitting both this argument by defendant's attorney and the prosecutor's remark upon defendant's election not to testify before the jury. Instead, the district court should have taken "prompt action . . . in the form of corrective instructions to the jury, and . . . admonition to the errant advocate." *Young*, 105 S.Ct. at 1045. The court's instructions to the jury at the conclusion of the arguments, however, did point out in two different places that the jury might draw no inference from defendant's election not to testify. His instruction in some degree mitigated the prejudice, but it did not "cure" the error even though defendant did not make an objection to this procedure. See, e.g., *United States v. Bates*, 512 F.2d

Viewing the prosecutor's remarks in context of the entire record in this case, we note that the argument by defendant's counsel emphasized that the government (1) had not "played straight with . . . the jury;" (2) had not given Robinson a "chance to explain" (reiterated repeatedly); (3) had not been "fair;" and (4) had improperly handled the evidence and had not brought forth "all the proof that they should to show you guilt and innocence" but was instead "carefully filtered." The government responded by commenting directly on defendant's failure to take the stand, not just by explaining how the government had, in fact, been "fair;" had during the investigation afforded defendant an opportunity to set out his position; and had presented sufficient and substantial evidence to establish guilt as charged. As before indicated, both defendant's counsel and the prosecutor were wrong and "two apparent wrongs—do not make for a *right* result." *Young*, 105 S.Ct. at 1044 (emphasis added).

The prosecutor's *Griffin* violation, permitted by the district court, does not mandate per se reversal because such constitutional error may be deemed harmless, not affecting substantial rights. See *Chapman*, 386 U.S. at 23-24, 87 S.Ct. at 827-828. Although "[a] defendant is entitled to a fair trial but not a perfect one," *Lutwak v. United States*, 344 U.S. 604, 619, 73 S.Ct. 481, 490, 97 L.Ed. 593 (1953); see also *Delaware v. Van Arsdall*, _____ U.S. _____, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986), the plain error rule does operate upon errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Atkinson*, 297 U.S. at 160, 56 S.Ct. at 392; see also *Darden v. Wainwright*, _____ U.S. _____, _____, 106 S.Ct. 2464, 2479, 90 L.Ed.2d _____

56, 58 (5th Cir.1975); *Courtney v. United States*, 390 F.2d 521, 529 (9th Cir.), cert. denied, 393 U.S. 857, 89 S.Ct. 98, 21 L.Ed.2d 126 (1968).

(1986) (Brennan, J., dissenting). Under all the circumstances in this case we find the prosecutor's *Griffin* error to have jeopardized the fairness of the trial.

In *Young*, the prosecutor's statements placed improperly into issue his credibility and beliefs about Young's guilt. In this case, however, the prosecutor's comments directly placed the defendant's credibility into issue by drawing attention to defendant's failure to testify. By raising before the jury's eyes the spectre of defendant's silence, the prosecutor, with the trial court's approval, encouraged the jurors to make inferences unfavorable to the defendant based solely upon defendant's right to remain silent.

The prosecutor's comments in this case, therefore, unreasonably exceeded the boundaries of response to defense counsel's contentions that the government had denied defendant an opportunity to explain. Furthermore, although very significant evidence supports Robinson's conviction, we cannot characterize the evidence presented before us as strongly as did the *Young* Court. The fact that the jury did not find Robinson guilty on all counts would indicate that the evidence, though substantial, was not as overwhelming as in *Young*. Nor do we find the court's belated, general instruction not to consider the defendant's silence an adequate cure of the harm to defendant's substantial constitutional right.

Based upon the record as a whole, we conclude that the prosecutor's comments, violative of defendant's right not to testify, rise to the level of plain error because they affected defendant's substantial rights and probably impacted adversely on the jury's deliberations. Because the prosecutorial misconduct in this case constitutes constitutional error, we may notice such error more freely. *United States v. Brown*, 555 F.2d 407, 420 (5th Cir.1977), cert. denied, sub nom. *Seymour v. United States*, 435 U.S. 904, 98 S.Ct. 1448, 55 L.E.2d 494 (1978). Cf. *Darden*, _____ U.S. at _____, 106 S.Ct. at 2472 (1986) (distinguishing

prosecutorial misconduct involving prosecutor's personal attacks on defendant from arguments implicating specific constitutional rights such as the defendant's right to remain silent). The plain error rule is to be used "sparingly" and to overcome misconduct that "undermine[s] the fundamental fairness of the trial and contribute[s] to a miscarriage of justice." See *Young*, 105 S.Ct. at 1047; see also *United States v. Frady*, 456 U.S. 152, 163 n. 14, 102 S.Ct. 1584, 1592, n. 14, 71 L.Ed.2d 816 (1982); *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936). We find this stringent standard to be satisfied in this case because the "invited response" itself exceeded what was necessary to protect the government's interest and was itself suggested by the court.

Upon consideration of the facts and the evidence in this case and considering the prosecutor's remarks in context with the entire record, we, albeit with some reluctance, conclude that plain error was committed in this case because we cannot say beyond a reasonable doubt that the *Griffin* error was harmless. See *Bates*, 512 F.2d at 58. The decision on the issue presented and reconsidered is an exceedingly close one, and we acknowledge that we set aside this conviction with reservations. Our considerable doubt about the fairness of the trial in light of the prosecutor's comment must result in giving the benefit of this doubt to the defendant Robinson. We have considered what we believe the probable effect of the improper (and unnecessary) remarks had upon the jury's ability to judge the evidence fairly.

Accordingly, we REVERSE the conviction of defendant, Thomas O. Robinson, Jr., and REMAND for further proceedings consistent with this opinion.

COHN, District Judge, dissenting.

The question on remand is whether the prosecutor's statements in rebuttal "undermine[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of justice," *United States v. Young*, _____ U.S. _____, 105 S.Ct. 1038, 1047, 84 L.Ed.2d 1 (1985), when viewed "against the entire record," *id.* Put another way, was the "jury . . . influenced to stray from its responsibility to be fair and unbiased" by the statement. *Id.*, 105 S.Ct. at 1048. Since my review of the evidence at trial, as marshalled in the uncontradicted description in the government's Brief On Behalf Of Plaintiff-Appellee filed on remand (see Appendix), satisfied me the answer to these questions is in the negative, I respectfully dissent. My view that the prosecutor's wholly improper argument had no effect on the outcome of the trial is reinforced by the facts that the jury acquitted Robinson of two of the four charges against him and that we have no doubts as to the propriety of the conviction of his wife. Lastly, I am constrained to observe that the test required by the Supreme Court in the circumstances of improper prosecutorial argument is likely the same whether it is disregard of ethical principles or a wrongful comment upon the exercise of a constitutional right. See *Delaware v. Van Arsdall*, 39 Crim.L.Rep. (BNA) 3007 (U.S. Apr. 7, 1986).

APPENDIX*

[I]n early 1979 [Robinson] leased a truck stop in Guthrie, Kentucky, and purchased a \$31,000 fire insurance policy on a wrecker and the contents of the truck stop's garage. On August 30, 1979, [Robinson] increased the insurance coverage on the garage contents from \$31,000 to \$50,000. Two days later, on September 1, 1979, there was an explosion and fire in the garage. [Robinson]

*Footnotes and citations to the record have been omitted.

subsequently submitted an \$80,000 insurance claim for the loss of the wrecker and the contents of the garage and an adjoining office.

Earlier in 1979 [Robinson] told a man whom he had solicited to become a partner in the truck stop that if the business turned out to be unsuccessful, he had a large inventory and could burn it. [Robinson] was consistently delinquent on his rent, and by September 1979 his business had significantly deteriorated. According to a local police officer who had previously worked for him, [Robinson] abruptly removed his race car and personal tools from the garage two or three weeks prior to the fire.

The day after the fire [Robinson's] insurance agent, Aaron Williams, inspected the burned-out areas. Williams observed that tools and equipment he had previously seen in the garage were missing, that [Robinson's] insured wrecker which was usually parked in front of the truck stop had been destroyed in the fire, and that [Robinson's] uninsured race car which was normally kept in the garage had not been damaged. Williams also observed that the office area of the garage did not contain the remains of a color television, an adding machine, or a copying machine that [Robinson] later claimed he had lost in the fire.

Shortly thereafter, investigators discovered that a "tremendous amount" of fire accelerant had been poured on the floor where the fire had started and that a desk in the office area contained no files or debris of any kind.

During the next several weeks, [Robinson] requested salesmen with whom he dealt to prepare false invoices showing that he had purchased an air compressor and over \$10,000 worth of tires so that he could submit them as part of his proof of loss to the insurance company.

Approximately a year later, on August 21, 1980, [Robinson's] house in nearby Clarksville, Tennessee was heavily damaged by arson about an hour after [Robinson] had left the premises with a large U-Haul truck filled with

most of his household furnishings. Firefighters and investigators inspected the premises shortly after the blaze had been extinguished. They discovered that a large, two-handled cooking pot containing gasoline had been left on a lit stove, that an electric fan had been left running near an air vent, and that "rapid rise" gasoline had been spread throughout the house. They also determined that the doors and windows were locked, that the house was sparsely furnished, and that there was nothing in most dresser drawers or in any of the closets, except for empty hangers and a few garments in one closet. The authorities later learned that the home security system had been turned off and disconnected from the electrical system prior to the blaze.

During the month preceding the fire at his home, [Robinson] had packed family belongings, moved household furnishings from his house, and held a yard sale that was attended by several neighbors. [Robinson] explained to one neighbor that he was moving his family to California, but he told another neighbor that they were going there for a visit. Two or three days before the fire [Robinson] began loading his household furnishings into a large U-Haul truck with the help of a 17-year-old neighbor, Christopher Edwards. Edwards also helped [Robinson] move older furniture and appliances from the garage into the house. The day before the fire Edwards's 11-year-old brother saw [Robinson] draining gasoline from his race car into a large, two-handle [sic] cooking pot. During the early morning hours immediately before the fire, Edwards helped [Robinson] load the truck with clothing, beds, a grandfather clock, a dining room set, a master bedroom set, a microwave oven, and a double-room refrigerator-freezer filled with meat. Edwards remained with [Robinson] and his family until sometime after 3:00 a.m., when they were ready to leave for California. While Edwards and [Robinson's] family waited out-

side, [Robinson] remained alone in the house for five to ten minutes. After [Robinson] left the house, he and his family departed in the U-Haul truck and an automobile, and Edwards went straight home, arriving there between 4:00 and 4:30 a.m. Less than an hour later, neighbors discovered that [Robinson's] house was on fire.

Several weeks later [Robinson] contacted the company that insured his Clarksville house. He stated that his family had left Clarksville to vacation in California but that they had decided to remain there because of the fire. He provided the company with a list of property allegedly lost in the blaze. When he was interviewed by investigators the following month, he denied that he had set the fire to his Clarksville house or that he had removed clothing and most of the furnishings from the house. He explained that he had locked all the doors and checked that the stove and fans were off before leaving the house and that he had moved "some things" to California for his daughter who was attending college there. Subsequently, [Robinson] mailed the insurance company a proof of loss statement and a claim for \$200,000 including a \$106,500 personal property claim. Property that [Robinson] had removed from his Clarksville house and included in his insurance claim was later discovered by authorities in his California residence.

The evidence for the defense consisted of the testimony of two of [Robinson's] children and a neighbor concerning the events surrounding the fires and the various items left in Tennessee or taken to California and of a business associate that [Robinson] had been current in his business dealings and that [Robinson] said he intended to return to Clarksville two weeks after going to California.

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APPENDIX B

**UNITED STATES COURT OF APPEALS-
FOR THE SIXTH CIRCUIT**

No. 82-5366

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS O. ROBINSON, JR., ET AL.,
DEFENDANTS-APPELLANTS

[Filed Sept. 30, 1986]

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER
OF THE COURT
JOHN P. HEHMAN, CLERK

/s/ LEONARD GREEN
Leonard Green, Chief Deputy

15a

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 82-5366

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS O. ROBINSON, JR., AND ALEIDA ROBINSON,
DEFENDANTS-APPELLANTS

Decided Sept. 7, 1983

Before KEITH and WELLFORD, Circuit Judges, and
COHN, District Judge.*

WELLFORD, Circuit Judge.

Defendants-appellants appeal their convictions by a jury in the United States District Court for the Middle District of Tennessee (Wiseman, J.) of mail fraud, 18 U.S.C. § 1341, and aiding and abetting, 18 U.S.C. § 2. The question is whether reversible error occurred at trial when the prosecutor was permitted by the court to comment on the failure of one of the defendants to take the stand in his own defense. We find that the misconduct deprived the defendant Thomas Robinson, Jr., of a fair trial under the Fifth Amendment and 18 U.S.C. § 3481,

*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

and therefore reverse his conviction.¹ Because we find that the error did not affect the trial of Aleida Robinson, we affirm her conviction.

Thomas Robinson, Jr., was convicted of two counts of mail fraud based on two separate fires and insurance claims and was sentenced to two five-year concurrent sentences, which were suspended except for five months and 29 days. Aleida Robinson, his wife, was convicted of one count and received two years probation.

The prosecution sought at trial to demonstrate that the defendants had fraudulently claimed losses on real and personal property destroyed by fire at their Clarksville, Tennessee, home and on business property destroyed by fire at a truck stop leased by Mr. Robinson in Guthrie, Kentucky. The prosecution introduced evidence to show not only that the losses submitted exceeded those actually incurred, but also to imply that Mr. and/or Mrs. Robinson set or caused the fires to be set. Both fires took place under suspicious circumstances in which the Robinsons were allegedly implicated.

¹ Section 3481 provides as follows:

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

The Supreme Court has commented on the legislative history of the statute as follows:

The legislative history shows that 18 U.S.C. § 3481 was designed, *inter alia*, to bar counsel for the prosecution from commenting on the defendant's refusal to testify.

Griffin v. California, 380 U.S. 609, 612 n.4, 85 S.Ct. 1229, 1232 n.4, 14 L.Ed.2d 106 (1965).

I.

Appellants contend that the following statement by the Assistant U.S. Attorney at the rebuttal stage of closing argument entitles them to a new trial:

He could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain.

Appellee contends that the statement was properly made because the defense attorney had "baited" the prosecutor by alleging in closing argument that the government had not "played fair" in its investigation and in the course of the trial.² The district judge agreed with the government

² The government argues that the following statements by defense counsel during closing argument entitled the government to make reference to the defendant's failure to testify:

Before I forget, my theme in arguing this case to you, I believe, is going to be that the Government has a duty to be fair. They have a duty to prove their case. And they have a duty to prove it, if they are going to prove it, fairly and squarely. And in this case, they haven't played straight with you members of the jury.

By the way, all those statements, I don't know how many statements we heard of Mr. Robinson, they were all about the arson. Did they ever give him a chance to explain about these sort of things, about mail fraud?

Did they ever give this man an opportunity in their many, many statements they took at the time to say, "Well, I had two bedroom sets."

... when he came to Tennessee in October, or shortly after the fire, within a month or so, they interviewed him about the arson.

... They never gave him a chance to explain.

Now, would you like to get indicted for that, without the Government being fair, and being able to explain, have him explain before you, members of your own community rather than before the agents?

that the defense had "opened the door" to a comment on the defendants failure to take the stand. Out of the presence of the jury, the judge made the following ruling:

Yes, Mr. Washko, I will tell you what, the Fifth Amendment ties the Government's hands in terms of commenting upon the defendants' failure to testify. But that tying of hands is not putting you into a boxing match with your hands tied behind your back and allowing him to punch you in the face.

That is not what it was intended for and not fair. I will let you say that the defendants had every opportunity, if they wanted to, to explain this to the ladies and gentlemen of the jury.

We might get reversed on it. Mr. Durham opened the door not less than four times in his argument on that question. I will let you comment on it in response.

Tr. at 681.

The Government also contends that if it was error for the comment to have been permitted, that the error was cured by the court's later instruction to the jury:

The law does not require a defendant to prove his innocence or produce any evidence at all, and no inference whatever may be drawn from the election of a

Now, here is what the Government, to be fair with the jury, should have done. They should have taken those items in the Kentucky inventory and just proved them. Why let the defendant disprove them, giving him an opportunity to explain?

The Government has not brought you all the proof that they should to show you guilt and innocence.

They brought you the type of proof that they carefully filtered, to try to infer [sic] circumstantially the guilt of Mr. Robinson. Shouldn't they have gone through and brought you evidence of more situations where there have been false claims rather than one or two for Kentucky?

Tr. at 658, 670-71, 674, 676.

defendant not to testify. The government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so you must acquit him.

...

The jury will also keep in mind this:

The law never imposes upon defendants in criminal cases the burden or duty of calling any witnesses or producing any evidence, and no adverse inference may be drawn from their failure to do so.³

In the alternative, the government argues that error, if any, was harmless.

II.

It is clear under *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), and *Wilson v. United States*, 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650 (1893), that no reference may be made at trial to a defendant's failure to testify. The Supreme Court held in *Griffin*:

Comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 [84 S.Ct. 1594, 1596, 12 L.Ed.2d 678], which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. *People v. Modesto*, 62 Cal.2d 436, 452-453 [42 Cal. Rptr. 417, 426-427], 398 P.2d 753,

³ The district judge gave these instructions during the course of his charge, not as a caution to the jury during the Government's closing argument. See Tr. at 694, 698.

762-763. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

380 U.S. at 614, 85 S.Ct. at 1232 (footnote omitted).

Appellee contends that there is precedent for permitting a prosecutor to make reference to a defendant's failure to testify, where, as here, defense counsel has accused the Government of not giving his client an opportunity to explain. In *United States v. Roberts*, 548 F.2d 665, 668-69 (6th Cir.1977), two defense attorneys explained to a federal jury that they had advised their clients not to testify because two and a half years had elapsed since the robbery, and they could not be expected to recall what they had done on a particular day at a particular time so long ago. The court held that the prosecutor was permitted to rebut with the following statement: "my question to you, or the Government's question to you is, do you think you would remember when you were arrested for bank robbery?" 548 F.2d at 669. Although the court allowed this *indirect* comment, neither *Roberts* nor the other case cited by appellee, *Cook v. Bordenkircher*, 602 F.2d 117 (6th Cir.1979), suggests that a *direct* comment on a defendant's failure to testify can be made, even if defense counsel has baited the prosecutor. In light of Mr. Robinson's counsel's statements, we can comprehend the desire of the district court to give "equal time," as it were, to the Government, but the action taken was impermissible under the fifth amendment. The error was not cured, moreover, by the court's later jury charge.

The prosecutor's comment in the instant case was an overt reference to the defendants failure to testify, not an oblique reference which reasonably could be construed in any other way. See *Angel v. Overberg*, 682 F.2d 605 (6th

Cir.1982) (*en banc*).⁴ In this instance it appears that "the prosecutor's manifest intent was to comment on the accused's failure to testify" and "the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Steele v. Taylor*, 684 F.2d 1193, 1204 (6th Cir.1982). The instant case is therefore distinguishable from *Butler v. Rose*, 686 F.2d 1163 (6th Cir.1982) (*en banc*), in which the court declined to grant a writ of habeas corpus to a petitioner who had been convicted in a state court trial.⁵ Furthermore, since the instant case is before the court on direct review, not habeas corpus relief, the standard of review is more stringent. See *United*

⁴ "If two plausible interpretations can be given to a prosecutor's ambiguous final argument, the court should not strive to adopt the one which casts doubt upon the prosecutor's intentions." 682 F.2d at 698.

⁵ The following statements were made by the prosecutor at closing argument in *Butler*:

Well, I submit to you, ladies and gentlemen, that you cannot allow that to happen in this case. Mr. Butler is an instructor and you have got to tell him as an instructor he cannot do this and get away. He cannot do this and just get it back and have an attorney say, "Ah, she is just not telling the truth" without putting one witness to show why she might be telling otherwise or *how* she might be telling otherwise. Apparently what Mr. Ellis is saying is that in a rape case we are just going to always say it is just made up and put on no proof to show why it was made up or anything to indicate the witness is lying in any way and then you just can't convict, couldn't convict in any rape case.

686 F.2d at 1166-67.

When the alleged infringement consists of statements which do not comment directly on the defendants failure to testify or suggests that an inference of guilt should be drawn from this fact, a reviewing court must look at all the surrounding circumstances in determining whether or not there has been a constitutional violation.

686 F.2d at 1170.

States v. Hasting, _____ U.S. _____, _____, 103 S.Ct. 1974, 1983, 76 L.Ed.2d 96 (Stevens, J., concurring).⁶ In the instant case the prosecutor's statement was the kind of comment on Mr. Robinson's failure to testify that an inference on guilt was to be drawn therefrom. It was therefore "fundamental error." *Rachel v. Bordenkircher*, 590 F.2d 200, 202 (6th Cir.1978).

III.

In cases involving such direct comments as the one at bar, "the court must reverse unless the prosecution can demonstrate that the error was harmless beyond a reasonable doubt." *Raper v. Mintzes*, 706 F.2d 161, 164 (6th Cir.1983). The government contends, without briefing the issue, that the error is harmless. In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court fashioned the following harmless error rule in the context of a *Griffin* violation:

[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

386 U.S. at 24, 87 S.Ct. at 828. In *Chapman* the Supreme Court found that the comments by the prosecutor were not harmless beyond a reasonable doubt:

[T]he state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of petitioners to testify, to all intents and purposes, the inferences from the facts and evidence had to be drawn in favor of the State—in short, that by their silence petitioners

⁶ Justice Stevens found a more stringent test to be warranted in reviewing whether a federal criminal conviction is harmless than would be warranted in reviewing a state conviction. The same logic would apply to the first step of determining whether a comment constitutes a *Griffin* error.

had served as irrefutable witnesses against themselves. And though the case in which this occurred presented a reasonably strong "circumstantial web of evidence" against petitioners, it was also a case in which, absent the constitutionally forbidden comments, honest, fair minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. Such a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession.

386 U.S. at 25-26, 87 S.Ct. at 828-29 (citations omitted).

Just recently in *United States v. Hasting*, _____ U.S. _____, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), the Supreme Court reaffirmed the harmless error doctrine and applied it to uphold a less severe *Griffin* violation. In *Hasting*, the federal prosecutor made reference to the defense's failure to "challenge" critical evidence. The Supreme Court held:

The question a reviewing court must ask is this: Absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?

_____ U.S. at _____, 103 S.Ct. at 1981. (citations omitted). Summarizing the evidence the Supreme Court found that "a more compelling case of guilt is difficult to imagine," _____ U.S. at _____, 103 S.Ct. at 1982, and held the error harmless.

The Sixth Circuit has applied the harmless error rule to *Griffin* violations. The court employed it in *Berryman v. Colbert*, 538 F.2d 1247 (6th Cir.1976) finding that a state prosecutor's improper reference to the failure of the defendant to testify could be considered harmless as to one of the counts of which he had been convicted since the comment principally complained of did not refer directly to that count. The court made clear that it was not relying completely on that distinction, but rather that it was also applying *Chapman* to hold the error harmless as to that particular count. The court found the "overwhelming and undisputed evidence of appellant's guilt" sufficient to find the prosecutor's comment "harmless beyond reasonable doubt." 538 F.2d at 1251.

The Sixth Circuit has since articulated with more particularity the rule to be applied in determining whether a *Griffin* error is harmless. In *Eberhardt v. Bordenkircher*, 605 F.2d 275 (6th Cir.1979), the court examined in detail the analysis to be applied in determining whether such an error is harmless. As the following excerpt indicates, the court applied a very narrow standard:

Harmless error, in the context of a violation of a constitutional right of a defendant, is an extremely narrow standard, permitting the State to avoid the retrial of a defendant only when it can demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant. *Chapman v. California*, 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].

605 F.2d at 278. Some of the factors to be taken into account include the strength of the evidence, the nature of the improper comment, any admonition to counsel, instructions to disregard, and "whether the trial was otherwise relatively error free." *Id.* at 279. See also *Hearn v. Mintzes*, 708 F.2d 1072 (6th Cir.1983).

When we consider the standards applied in *Eberhardt*, we find that in the instant case, the government has failed to tip the scales as to defendant Thomas Robinson, Jr. While the evidence is strong as to both defendants, it is at least in part circumstantial, and no curative instruction was given at the time of the comment on Mr. Robinson's silence. See *United States v. Flannery*, 451 F.2d 880, 882 (1st Cir. 1971). Furthermore, the improper comment was made during the prosecutor's rebuttal—the final chance for either attorney to address the jury. Under these circumstances, we cannot find the error harmless beyond a reasonable doubt as to defendant Thomas Robinson, Jr.

IV.

While it was error for the trial court to have permitted the prosecutor to comment on the failure of one of the defendants to take the stand, we must consider whether that error infected the trial of the other defendant so as to require her conviction to be set aside.

The entire emphasis of the statements made by defense counsel in his closing were on Mr. Robinson's conduct, which the prosecutor, and also the trial court, deemed unfair and baiting. The prosecutor's comment, which we have found to constitute constitutional error, was directed also entirely toward Mr. Robinson. We consider, then, whether the remarks constituted reversible error by also tainting the trial of codefendant Aleida Robinson, who similarly did not testify.

As pointed out, the strong emphasis of the comment held to be a constitutional violation as to Mr. Robinson was that he had indeed been afforded an opportunity to explain the fraud charges. For example, as set out in footnote 2, these references responded to by the prosecutor

were among those made by defense counsel in his closing jury argument to Mr. Robinson, but *no allusions were made to Mrs. Robinson*:

I don't know how many statements we heard of Mr. Robinson. . . . Did they ever give *him* a chance to explain . . . ?

Did they ever give *this man* an opportunity in their many, many statements they took . . . to say, "Well, I had two bedroom sets."

. . . .
 . . . When *he* came to Tennessee . . . they interviewed *him* about the arson. . . .

. . . .
 . . . Why let *the defendant* disprove them giving *him* an opportunity to explain?

. . . .
 They brought you the type of proof that they carefully filtered, to try to infer [sic] circumstantially the guilt of Mr. Robinson.

(Emphasis added.)

Under all these circumstances, we find that the error which occurred was harmless beyond a reasonable doubt on the charges made against Aleida Robinson. Each defendant was on trial separately, and the jury was told that the guilt or innocence of one defendant was not indicative of the guilt or innocence of the other defendant. While the evidence implicated both defendants in the fraud charged, this factor is not sufficient under the particular circumstances recounted to set aside the verdicts as to Mrs. Robinson.

Mrs. Robinson was charged with fraud with her husband and with aiding and abetting him in the commission of fraud. We find distinguishable the cases holding that where comment is made on the failure of one defendant to testify, that misconduct may also be prejudicial to a co-defendant. *Kinser v. Cooper*, 413 F.2d 730 (6th Cir. 1969);

Scott v. Perini, 439 F.2d 1066 (6th Cir.1971). Unlike the situation in *Kinser*, Mrs. Robinson was charged with a substantive offense, and the *Kinser* court observed

it is not like a *joint indictment* of two persons for a crime where *either one or both* may be convicted.

413 F.2d at 732 (emphasis added). Also in the instant case, there was substantial evidence of fraud from a number of witnesses, whereas in *Kinser*, there was essentially the testimony only of the rape victim and the alleged perpetrator of the offense; the comment on the silence of the alleged aider and abettor was therefore particularly significant in that context where the defendant had taken the stand to deny that he was the attacker.

In *Scott*, it was observed that "the prosecuting attorney commented vigorously and at length upon the failure of Pollard [the co-defendant] to take the stand" and the Judge himself commented on that silence. 439 F.2d at 1067. The defendant who objected in *Scott* to the prosecutor's and the judge's comments on the silence of a co-defendant also himself took the stand, unlike either defendant in the case sub judice. We find these cases not controlling under these circumstances.

Accordingly, we reverse the conviction on all counts of Mr. Robinson, but we affirm the conviction of Mrs. Robinson. The cause is remanded for further proceedings in accordance with this opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5366

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS O. ROBINSON, JR., AND ALEIDA ROBINSON,
DEFENDANTS-APPELLANTS

[Filed July 9, 1986]

JUDGMENT

Before KEITH and WELLFORD, Circuit Judges, and COHN, District Judge.

UPON CONSIDERAION [*sic*] of the opinion of the United States Supreme Court, reconsideration of the original opinion and judgment of this Court of September 9 [*sic*], 1983, and review of the supplemental briefs,

IT IS NOW here ordered and adjudged by this Court that the judgment of the District Court in this case is reversed as to the defendant Thomas O. Robinson, Jr., and the case is remanded for further proceedings consistent with this opinion.

No costs taxed.

ENTERED BY ORDER OF THE
COURT

John P. Hehman, Clerk

/s/ JOHN P. HEHMAN

Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5366

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS O. ROBINSON, JR., AND ALEIDA ROBINSON,
DEFENDANTS-APPELLANTS

[Filed Sept. 9, 1986]

ORDER

Before KEITH and WELLFORD, Circuit Judges, and COHN*, United States District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

*Hon. /vern Cohn sitting by designation from the Eastern District of Michigan.

Judge Cohn maintains his position in his dissent.

ENTERED BY ORDER OF THE
COURT

/s/ JOHN P. HEHMAN

John P. Hehman, *Clerk*

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5366

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS O. ROBINSON, JR., AND ALEIDA ROBINSON,
DEFENDANTS-APPELLANTS

[Filed Sept. 7, 1983]

JUDGMENT

Before KEITH and WELLFORD, Circuit Judges, and
COHN, District Judge.

ON APPEAL from the United States District Court for
the Middle District of Tennessee.

THIS CAUSE came on to be heard on the record from
the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this court that the judgment of
the said District Court in this case be and the same is
hereby reversed as to the conviction on all counts of Mr.
Robinson, affirmed as to the conviction of Mrs. Robinson
and the cause is remanded for further proceedings in ac-
cordance with the opinion of this Court.

32a

No costs taxed.

ENTERED BY ORDER OF THE
COURT

John P. Hehman, Clerk

/s/ JOHN P. HEHMAN

Clerk

A True Copy

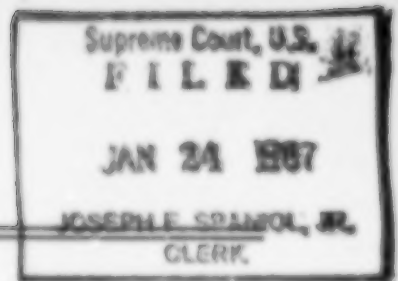
Attest:

/s/ AUDREY CROCKETT

Deputy Clerk

OPPOSITION BRIEF

(2)
No. 86-937



In The
Supreme Court of the United States
October Term, 1986

— o —
UNITED STATES OF AMERICA,

Petitioner,

v.

THOMAS O. ROBINSON, JR.,

Respondent.

— o —
**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

— o —
BART C. DURHAM, III
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Attorney for Respondent

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REASONS FOR DENYING THE PETITION

I.

THE COURT OF APPEALS WAS CORRECT IN ITS FINDING THAT THE HOLDING OF THIS COURT IN THE UNITED STATES v. YOUNG DID NOT AFFECT THAT COURT'S PREVIOUS RULING IN THIS CAUSE.

As noted in the petitioner's Statement of the Case, this Court previously vacated the original Judgment of the Court of Appeals and remanded the case with instructions to reconsider that decision in the light of *United States v. Young*, 470 U.S. 1 (1985). See 470 U.S. 1, 25 (1985). On remand, the Court of Appeals distinguished *Young* and again reversed the respondent's conviction.

It is of fundamental importance to the Court's appreciation of the issues presented by this Petition that the Court first recognize that the difference between the character of the comments at issue in *Young* and *Robinson* lies much deeper than merely the grounds acknowledged by the government's Petition, which acknowledges the simple recognition that *Young* deals merely with an abuse of the proper ethical standards and governmental responsibility concerning prosecutorial argument—e.g., an “ethical” violation—as distinguished from *Robinson's* prosecutorial constitutional violation of the defendant's Fifth Amendment rights.

In *Young*, the defense counsel's “opening salvo” constituted a vicious personal attack on the prosecutor and upon his integrity in bringing the charges to begin with, including the incredible assertions that the prosecutor himself did not believe in the defendant's guilt, that the

prosecutor had acted "reprehensibly," and that the defendant was "the only one in this whole affair that has acted with honor and with integrity." *Young*, supra, 470 U.S. at 4-5. Furthermore, the prosecutor's reply to said comments was, essentially, strictly responsive to the comments themselves. *Id.*, at 5-6; 11-19.

In the instant cause, however, defense counsel's "triggering" comments did not constitute a personal attack on the integrity of the prosecutor or his beliefs, but were rather an attempt to raise a legitimate question of whether the prosecution's admittedly legal investigatory maneuvers during the early stages of the investigation in this cause were, in fact, fair or misleading in their contemporaneous context. Specifically, defense counsel's argument in its context, in no way implied any refusal of the government to listen to the defendants at any time, and certainly no inability on the part of the defendant to have testified to the jury, but was rather *on its face* a complaint that the government agents had, to all appearances, investigated this case strictly as a question of arson and had repeatedly questioned the defendants strictly on this basis alone, before indicting them instead for mail fraud, by using statements made (to the extent of the defendants' knowledge) strictly concerning an arson case, as part of the basis of the mail fraud evidence against the defendants. Specifically, defense counsel was upset that in this context the defendants' lack of explanation as to various facts (relevant to the mail fraud allegations for which the defendants were on trial) was impliedly used against them when these statements were admitted at trial, when to the defendants' contemporaneous knowledge the statements that they were giving dealt solely with a

case of arson, with the result that many details which might otherwise have seemed relevant to the defendants concerning an allegation of fraud (and therefore would have been included in these statements) may in this context have seemed irrelevant to the defendants and therefore been omitted.

While there is no question here of the government's conduct having been illegal or even reprehensible—and such a characterization was *never* asserted to the jury herein—nevertheless there is a legitimate question of whether in this context such tactics were indeed "fair", in the lay sense of the term, and this question could in turn legitimately and significantly affect a juror's opinion as to the weight which he should give to any alleged deficiencies in the defendants' statements proffered by the government. Certainly, it seems of questionable fairness when such tactics result in the fact that the defendants can answer such alleged deficiencies only by taking the stand and subjecting themselves to vigorous cross-examination, when it is possible that had they been aware of the true nature of the charges contemplated against them, such deficiencies would have been answered in the statements themselves.

Such arguments do not lie entirely outside the realm of the zealous advocacy expected of defense counsel, as the comments by defense counsel in *Young* plainly do.

Defense counsel's argument herein was as follows:

By the way, all those statements, I don't know how many statements we heard on Mr. Robinson, they were all about the arson. Did they ever give him a chance to explain about these sorts of things, about mail fraud?

Did they ever give this man an opportunity in their many, many statements they took at the time to say, 'well, I had two bedroom sets.' Here is the picture, Exhibit B. You saw this.

I will show you Exhibit D. And B was the one bedroom set. They are all the same. They are all furniture that burned up in the fire.

Did the government say, 'what did you have? Can you show us any proof, Mr. Robinson?'

No. He was in the State of California, transacting business by mail. When he came to Tennessee in October, or shortly after the fire, within a month or so, they interviewed him about the arson. They didn't say, 'what is this? Do you have a microwave oven? What is this microwave oven? What about these bedrooms? What about this?' The furniture and clothing, all that clothing out on the lawn, testified to by Mrs. Baxter, 'what about your clothing?' They never gave him a chance to explain.

They said 'we want to talk to you about the arson' and led him to believe he was a suspect and let him go back to California and let him be there.

[R.670-671]

The repeated statements in his summation by defense counsel that the government had denied the defendant a fair opportunity "to explain", which are the basis of the government's argument herein, were a continuation and elaboration of this theme, which on its face dealt strictly and specifically with a chance to "explain" during the taking of the pre-trial statement by the government, and never in any possible context referred in any way to a lack of opportunity to "explain" anything in open court.

It is readily apparent that the rebuttal comments by the prosecuting attorney herein did not simply attempt to

redress the comments of defense counsel, but instead used this argument as an opportunity to leap head first at what he perceived as the apparent chance of that which is otherwise undisputedly constitution anathema—a direct comment upon the defendants' failure to testify. Each of the other comments made by the United States Attorney might arguably be justified as a rebuttal to defense counsel's argument (see *infra*), but there was simply and absolutely nothing in the defense argument that ever implied that the government had refused to give the defendants a chance to testify in open court.

The utterly extraneous nature of the prosecution's gratuitous comment upon the defendants' Fifth Amendment rights is glaringly evident from a simple reading of the entire statement, in which the Fifth Amendment comment is baldly juxtaposed against a number of other statements which do arguably respond to defense counsel's argument:

MR. WASHKO: Ladies and gentlemen, Ms. Gildreth and myself, we represent the United States of America. We are representing the people of it.

Our obligation is to insure that the innocent are protected and the guilty are prosecuted to the fullest extent of the law.

Mr. Durham made representations that we didn't play fair. We have an ethical duty to play fair. What we know through out investigations, matters that are exculpatory, there is case law, and an abundance of it, the Court rules require it, that we turn it over to the defendants.

We don't hide. We don't play trial by ambushes. The government has subpoena power and the defendants have subpoena power to bring anybody he wants.

That is why Your Honor has sustained the objection about not bringing other witnesses, because the defense can explain, through their witnesses, anything they want to explain.

Mr. Durham has made comments to the extent the government had not allowed the defendants an opportunity to explain. It is totally unacceptable.

He explained himself away on tape right into an indictment. He explained himself to the insurance investigator, to the extent that he wanted to.

He could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain.

[R. 684-685]

While most of the above statements would clearly have been error had they been offered in a context other than as rebuttal to specific defense argument, nevertheless the respondent has *never* argued that any of these comments—save for the blatantly extraneous Fifth Amendment comment—were error when viewed in the context herein, answering defense counsel's previous statements. *These* other comments *are* generally analogous to those in *Young*, both in basic character (non-constitutional issues, dealing only with the acceptable range of personal involvement within prosecutorial argument) and in their generally responsive nature to the defense argument's "provocation."

These comments—which in a non-rebuttal context would otherwise have been patently erroneous—*were* arguably proper in answer to the previous statements by the defense.

But the incredibly extraneous Fifth Amendment comment stands alone—utterly gratuitous, inherently unre-

sponsive to the context, and above all a blatant attempt to circumvent one of the most fundamental protections of the United States Constitution.

As noted by the Court of Appeals in its opinions below, this was not simple, but rather "fundamental error."

Unlike the case in *Young*, to allow the government to take the liberty which it chose to seize in this trial would be to undermine the fundamental system of justice which it is the essential purpose of the appellate process to preserve.

While the Court of Appeals has consistently rejected the respondent's contention that defense counsel's arguments amounted to legitimate advocacy, nevertheless the Court repeatedly and unequivocally acknowledged that there was no discernable connection between defense counsel's arguments and the government's decision to leap upon the opportunity to inject an extraneous comment upon the defendant's failure to testify. Indeed, as the opinion upon remand for the consideration of *Young* makes overwhelmingly clear, *this is the essential distinction found by the Court of Appeals between this case and Young and the fundamental justification for its holding herein, yet it must be noted that this entire argument is unmentioned by the government anywhere in its Petition for Certiorari:*

In the instant case, on the other hand, there was a prosecutorial comment upon the exercise by Robinson of his *constitutional* right not to testify made in response to defense counsel's repeated assertion in final argument that the government gave Robinson no 'chance to explain' his actions. The District Court allowed the government to respond in argument 'that the defendants had every opportunity, if they wanted

to, to explain this.' If the prosecutors' comments had been limited to responding that the defendant, Robinson, was given the opportunity *throughout the investigation* to explain his position without directly pointing out his failure to take the witness stand, we would find little difficulty in deciding that there was no plain error. The trial court, however, without objection by the defendant, permitted the United States Attorney to respond in closing argument that Robinson had made no explanation *before the jury* about evidence supporting the indictment charges. This was permitted by the District Judge in an action taken before the Supreme Court's analysis in *Young*, as an 'invited error' response to unfair comments repeatedly made by defendants' counsel in his argument.

In viewing the prosecutor's remarks in context of the entire record in this case, we note that the argument by defendants' counsel emphasized that the government (1) had not 'played straight with' . . . the jury; (2) had not given Robinson a 'chance to explain' (reiterated repeatedly); (3) had not been 'fair;' and (4) had improperly handled the evidence and had not brought forth 'all the proof that they should to show you guilt and innocence' but was instead 'carefully filtered.' The government responded by commenting directly on defendants' failure to take the stand, not just by explaining how the government had, in fact, been 'fair;' had during the investigation afforded defendant an opportunity to set out his position; and had presented sufficient and substantial evidence to establish guilt as charged. As before indicated, both defendants' counsel and the prosecutor were wrong and 'two apparent wrongs—do not make for a *right* result.' *Young*, 105 S.Ct. at 1044 (emphasis added).

United States v. Robinson (Sixth Cir.1986), at pp. 6a and 7a of Appendix to the Petition for Certiorari filed by the government herein.

(Emphasis in the original).

The government's failure to acknowledge this basis of the holding of the Court of Appeals herein in their Petition, and its concurrent failure to address this issue in any way, is indicative of a tacit admission that the government has no argument whatsoever with which to respond to the Court of Appeals on this issue. Indeed, respondent submits that it is self-evident that there is no answer which the government could offer to the Court upon this point.

Under these facts, and in this specific context, it seems undisputable but that the government's error in this cause was "more than obvious," "affected 'substantial rights,'" and "had an unfair prejudicial impact on the jury's deliberations" (see *United States v. Young*, supra, 470 U.S. at 17n.14", and that the Court of Appeals was therefore justified in finding that the government's actions herein constituted "plain error" pursuant to Fed. R. Crim. Proc. 52(b). *Id.* Therefore, the government's Petition for Certiorari should be denied.

II.

THIS CASE IS AN INAPPROPRIATE VEHICLE FOR THE DETERMINATION OF THE REMAINING ISSUES SUGGESTED BY THE GOVERNMENT.

Respondent notes that the government argues that a significant division exists among the circuits as to whether the Fifth Amendment prohibits prosecutors from characterizing the government's proof as "uncontradicted" or "unrefuted", and argues that "[t]his case presents an appropriate opportunity in which to resolve the confusion among the circuits over the proper scope to be accorded to the rule in *Griffin [v. California]*, 380 U.S. 609 (1965)]." (Petition for Certiorari, pp. 14-15)

Respondent shall not address the substantive merits of this question, inasmuch as it must appear obvious from the argument in Issue I, *supra*, that this is not a proper case in which to raise this question, for the direct and egregious comment upon the defendants' failure to testify by the prosecution herein bodes no comparison whatsoever with the infinitely more subtle question presented by such cases.

Similarly, while the question of whether the "plain error" doctrine should be more readily noticed for constitutional claims (Petition for Certiorari, pp. 16-21) is properly raised by this case, nevertheless this case is not an appropriate vehicle for the determination of said issue by this Court, because (as illustrated in the argument on Issue I, *supra*) the prosecutorial misconduct in this cause clearly amounted to error which was "more than obvious or readily apparent," "seriously affected 'substantial rights,'" and "had an unfair prejudicial impact on the jury's deliberations" (*United States v. Young*, *supra* 470 U.S. at 17n.14), irrespective of the Court of Appeals' distinction as to the claim being based upon a constitutional issue.

III.

THIS IS NOT AN APPROPRIATE CASE FOR THE COURT TO RELY UPON DISTINCTIONS RESULTING FROM THE CONTEMPORANEOUS OBJECTION RULE, INASMUCH AS NONE OF THE PRINCIPLES WHICH FORM THE BASIS OF THIS RULE WERE VIOLATED BY THE MERELY TECHNICAL LACK OF AN OBJECTION IN THIS CASE.

As noted by the government in its Petition:

The contemporaneous objection rule serves obvious and salutary purposes. Timely objection affords both

the trial court and the prosecutor the opportunity to consider, and perhaps rectify, their decisions and trial tactics while it is still possible to do so. [citations omitted] If a defendant prevails on his objections, he may avert prejudicial error and thus enhance his chances to secure an acquittal from the jury. And if he nonetheless is convicted, his timely objections will have defined the points to be reviewed on appeal and will have obviated the need to reverse a conviction simply because an error that was susceptible of correction was not perceived at trial. [footnote] As the Court has observed, "(a) contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest [and] . . . [I]t enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question A contemporaneous objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation." [citation omitted]

(Petition for Certiorari, p. 18.)

In the instant case, no one could possibly dispute that even one of these bases for the contemporaneous objection rule has been violated. The prosecutorial comments in question were made only after a jury-out hearing, during which various motions were argued before the Court. The District Judge was obviously made fully aware of the issue which had been formally presented to him by the government's request and of the implications of his formal ruling thereupon, even to the point of his noting that "[w]e might get reversed on it." (R.680-681) The District Judge argued the motion himself with the United States Attorney ruling upon the motion without asking for argument from defense counsel. In effect, the District Judge treated

the issue as if it had been objected to, automatically, by defense counsel, and ruled upon the subject only after cutting short the hearing on the court's own initiative.

No one could seriously contend that the issue in this case was error which slipped by the attention of the District Court without an appropriate opportunity for that court to correct said mistake, because it was "not brought to the attention of the court." Federal Rules of Criminal Procedure 52(b).

The merely technical and inadvertent lack of specific objection by defense counsel, which occurred only because the court and prosecuting attorney had treated the issue as one which had been objected to, should not in these circumstances become the sole factor enabling the government to inject extraneous and egregious fundamental error into the respondent's trial, without correction by the federal appellate system.

CONCLUSION

For the reasons stated, the government's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BART C. DURHAM, III
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Attorney for Respondent

REPLY BRIEF

3
No. 86-937

Supreme Court, U.S.
FILED
FEB 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS O. ROBINSON, JR.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

BEST AVAILABLE COPY

6 pp

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In the Supreme Court of the United States

OCTOBER TERM, 1986

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UNITED STATES OF AMERICA, PETITIONER

v.

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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

REPLY MEMORANDUM FOR THE UNITED STATES

In our petition, we contended that the court of appeals' judgment reversing respondent's convictions was flawed in two respects. First, the court of appeals misconstrued this Court's decision in *Griffin v. California*, 380 U.S. 609 (1965), and it did so in a fashion symptomatic of the wider confusion among the lower federal courts about the scope of the *Griffin* rule. Second, the court of appeals misapplied the "plain error" doctrine, holding that courts are freer to overlook a failure to object at trial where the error in issue implicates constitutional rights.

1. Respondent does not dispute our argument that the rule in *Griffin* applies only to comments that ask the jury to treat a defendant's failure to testify as evidence of his guilt. Moreover, respondent expressly declines to address (Br. 9-10) our contention that the lower federal courts have construed the *Griffin* rule in conflicting ways, many of which lack any basis in the *Griffin* decision or its progeny.

Instead, respondent devotes nearly his entire brief (*id.* at 1-9) to an argument intended to show that the trial court and prosecutor misinterpreted defense counsel's summation. According to respondent, counsel did not accuse the government of denying respondent a chance to explain himself at trial; rather, according to respondent (*id.* at 4), counsel simply claimed that respondent had not been given a chance to refute the fraud charges during the pre-indictment investigation. Respondent contends, therefore, that the prosecutor's rebuttal was "utterly gratuitous, inherently unresponsive to the context, and above all a blatant attempt to circumvent one of the most fundamental protections of the United States Constitution" (*id.* at 6-7). Respondent concludes (*id.* at 10) that because of the prosecutor's "egregious" remarks there is no reason in this case for the Court to consider "the infinitely more subtle" issues raised in our petition.

Respondent's contention provides the best possible evidence of why the contemporaneous objection rule must be fully applicable to claims of constitutional error. If respondent's attorney intended his summation simply to argue that respondent had not been given a chance to explain himself to the investigators, that point was certainly lost on the trial court. The trial court understood counsel's remarks just as the prosecutor did: as an assertion that respondent had been denied a chance to testify at trial. The trial judge stated explicitly that this was how he understood counsel's argument (Tr. 681). But while defense counsel objected to other rebuttal arguments that the prosecutor proposed to make (*id.* at 682-683), he made no objection either to the trial court's interpretation of his summation or to the court's ruling permitting the prosecutor to respond (Pet. App. 2a). Accordingly, the trial court could only have understood counsel to agree that the court's interpretation of his remarks was correct and that the prosecutor was lawfully

entitled to respond. If counsel felt otherwise, he was obligated to say so at the time.*

2. Respondent concedes (Br. 10) that this case presents the question whether the plain error rule applies with equal force to claims of constitutional error. Respondent contends (*id.* at 10-12), however, that this is not an appropriate case in which to resolve the conflict among the circuits on that question. In respondent's view, there was no reason in this case for "[t]he merely technical and inadvertent lack of specific objection by defense counsel" (*id.* at 12) since "[t]he District Judge was obviously made fully aware of the issue" and ruled on it "without asking for argument from defense counsel" (*id.* at 11). But the trial court plainly did not appreciate what respondent now advances as the true meaning of his attorney's summation. Had counsel provided that explanation when the issue was first raised, the trial court may well have ruled differently. In any event, the court would have had an opportunity to consider respondent's explanation before the prosecutor gave his summation and the jury rendered its verdict. Respondent's post hoc reconstruction of his attorney's summation is a perfect illustration of why the contemporaneous objection rule must be applied with equal force to all objections at trial, constitutional or otherwise.

*Respondent claims (Br. 7-9) that the court of appeals shared his view that the trial judge and prosecutor misconstrued the import of defense counsel's summation. There is no basis in the court's opinion for that claim. To the contrary, the court of appeals acknowledged (Pet. App. 7a) that counsel "reiterated repeatedly" that respondent had not been given a "chance to explain" and concluded (*ibid.*) that these remarks and others by defense counsel "were wrong." The court of appeals reversed not because it believed that the prosecutor misunderstood defense counsel's remarks but because it determined that, regardless of the purpose or context of the prosecutor's rebuttal, the rule in *Griffin* precludes any reference to a defendant's failure to testify at trial.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

FEBRUARY 1987

JOINT APPENDIX

No. 86-937

FILED

APR 9 1987

JOSEPH F. SPANGL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

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JOINT APPENDIX

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Counsel for Petitioner

**PETITION FOR WRIT OF CERTIORARI FILED
DECEMBER 8, 1986
CERTIORARI GRANTED FEBRUARY 23, 1987**

3480

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

Nos. 81-30079, 81-30106

UNITED STATES OF AMERICA

v.

THOMAS O. ROBINSON, JR.
ALEIDA L. ROBINSON

DATE	PROCEEDINGS
5-20-81	Superseding Indictment Filed.
5-6-82	Verdict. Deft. found guilty on Ct. 1 & 4. Not Guilty on Cts. 2 & 3.
6-16-82	ENTERED: J & C dtd. 6-16-82. PNG, verdict of G as to cts. 1 & 4. NG as to cts. 2 & 3. Court dis. Cts. 5 & 6. Defdt. comm. to cus. of AG for 5 yrs. as to Ct.1; & on cond. that defdt. be con- fined in a jail type instit. for a pd. of 5 mts. & 29 days, the execution of the re- mainder of the sent. of imprison. is susp. & the defdt. placed on prob. under the usual terms & cond. of prob. Imposit. of sent. susp. as to Ct. 4 & defdt. placed on prob. for pd. of 5 yrs. to run concurrent w/ the prob. pd. on Ct. 1. The defdt is to remain on his present bond until he reports, on his own recog. to the instit. designated by the Bureau of Prisons on or before

DATE

PROCEEDINGS

noon Mon. 7-12-82. Court recommend that defdt. be incarcerated at the Sheriff's Work Release Center Alameda Co., CA. Cy to USA, USM(3) USP(3), attny. & defdt.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5366

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS O. ROBINSON, JR., AND ALEIDA L. ROBINSON
DEFENDANTS-APPELLANTS

DATE

FILINGS—PROCEEDINGS

6/22/82	Copy of notice of appeal, filed; and cause docketed
9/7/83	Judgment of the District Court reversed as to the conviction on all counts of Mr. Robinson, affirmed as to the conviction of Mrs. Robinson and the cause is remanded for further proceedings (Keith, Wellford and Cohn, JJ.)
9/7/83	Opinion by Wellford, J.
10/7/83	Mandate issued
10/7/83	Opinion with mandate
10/24/83	Notice of filing petition for writ of certiorari (Sup. Ct. No. 83-613)
4/3/85	SUPREME COURT NOTICE: cert. granted (Sup. Ct. No. 83-613)
4/3/85	SUPREME COURT JUDGMENT/OPINION Vacated and Remanded
7/9/86	19) JUDGMENT: reversed as to defendant Thomas O. Robinson and remanded (Keith, Wellford and Cohn, JJ.) (Dissent, Cohn, J.)
7/9/86	OPINION: (Wellford, J.)

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

No. 81-30106
18 U.S.C. §§ 1341, 2, and 1014
26 U.S.C. §§ 5861(d) and 5861(f)

UNITED STATES OF AMERICA

v.

THOMAS O. ROBINSON, JR. (81-30079)
ALEIDA L. ROBINSON (81-30106)

FILED MAY 20, 1981

SUPERSEDING INDICTMENT
COUNT ONE

The Grand Jury charges:

1. From on or about the first day of August, 1979, to on or about the date of the return of this indictment, in the Middle District of Tennessee and elsewhere, THOMAS O. ROBINSON, JR., devised and intended to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises from the Great American Insurance Company, Nashville, Tennessee, (hereinafter referred to as Great American), who would be and in fact was induced thereby to rely upon said false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be

and were false when made, the scheme and artifice so devised, and intended to be devised being in substance as follows:

2. It was part of the scheme and artifice to defraud that:

a. THOMAS O. ROBINSON, JR., who had a business known as T & G Truck Repair Service, Guthrie, Kentucky, would and did insure the property at that location, including its contents, with Great American.

b. On or about August 30, 1979, THOMAS O. ROBINSON, JR., did cause the insurance coverage on the contents of the property to be increased from \$31,000 to \$50,000.

c. On or about September 2, 1979, THOMAS O. ROBINSON, JR., would cause the premises known as T & G Truck Repair Service, Guthrie, Kentucky, to be destroyed by an explosion and fire.

d. Thereafter, THOMAS O. ROBINSON, JR., did file a claim with Great American alleging the loss of numerous items of equipment, tires, tools, and other inventory and supply items well knowing that at the time such claim was filed that such items were not contained on the premises at the time of the fire and had not been destroyed by fire.

e. In support of the claim, THOMAS O. ROBINSON, JR., did furnish to Great American false and fictitious [sic] receipts for items of equipment and inventory allegedly destroyed in the fire when in truth and in fact, as THOMAS O. ROBINSON, JR., then knew, that such receipts were false and that the amount of equipment and inventory as contained on the bogus receipts had not been so destroyed.

3. On or about October 31, 1979, in the Middle District of Tennessee and elsewhere, for the purposes of executing the aforementioned scheme and artifice to

defraud, and in attempting to do so, THOMAS O. ROBINSON, JR. did cause to be delivered by the United States Postal Service, according to the direction thereon, a letter addressed to Great American Insurance Company Claims Department, 309 Vine Street, Cincinnati, Ohio, containing a proof of loss completed by THOMAS O. ROBINSON, JR. against Great American with receipts and documents and mailed from the Nashville, Tennessee office of Great American.

In violation of Title 18, United States Code, Section 1341.

COUNT TWO

The Grand Jury further charges:

On or about February 26, 1979, in the Middle District of Tennessee, THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON knowingly did make a materially false statement in an application for a loan submitted by THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON to the Northern Bank of Tennessee, Clarksville, Tennessee, for the purpose of influencing the action of the bank to approve the loan, in that THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON stated and represented in their application and security agreement that they were the owners of certain inventory pledged as collateral for the loan, when in truth and in fact, as THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON then well knew, they did not own the collateral but were merely leasing it.

In violation of Title 18, United States Code, Section 1014.

COUNT THREE

The Grand further Jury charges:

On or about May 25, 1979, in the Middle District of Tennessee, THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON knowingly did make a materially false statement in an application for a loan submitted by THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON to the Northern Bank of Tennessee, Clarksville, Tennessee, for the purpose of influencing the action of the bank to approve the loan, in that THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON stated and represented in their application and security agreement that they were the owners of certain inventory pledged as collateral for the loan, when in truth and in fact, as THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON then well knew, they did not own the collateral but were merely leasing it.

In violation of Title 18, United States Code, Section 1014.

COUNT FOUR

The Grand Jury further charges:

1. From on or about the first day of August, 1980, to on or about the date of the return of this indictment, in the Middle District of Tennessee and elsewhere, THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON, devised and intended to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises from the Allstate Insurance Company, Nashville, Tennessee, (hereinafter referred to as Allstate), who would be and in fact was induced thereby to rely upon said false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises

would be and were false when made, the scheme and artifice so devised, and intended to be devised being in substance as follows:

2. It was part of the scheme and artifice to defraud that:

a. THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON, who resided at 1561 Liberty Church Road, Clarksville, Tennessee, would and did insure their residence at that address, including its contents, with Allstate.

b. Shortly before August 21, 1980, THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON would conduct, or cause to be conducted, a yard sale at their residence in Clarksville, Tennessee, and would sell numerous items of clothing and furniture to members of the public.

c. On or about August 20, 1980, THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON would cause numerous items of furniture, clothing, and related items from their residence in Clarksville, Tennessee, to be loaded into a U-Haul truck and such items to be removed from the state of Tennessee.

d. On or about August 21, 1980, THOMAS O. ROBINSON, JR. would cause his residence at 1561 Liberty Church Road in Clarksville, Tennessee, to be destroyed by an explosive device as more fully set out in count two of this indictment.

e. Thereafter, THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON did file claims with Allstate alleging the loss of numerous items of furniture, clothing, tools, and other items of personal property well knowing that at the time such claims were filed that such items were not in the residence at the time of the fire and had not been destroyed by fire.

f. On or about September 8, 1980, THOMAS O. ROBINSON represented to Allstate that he had moved to California on vacation and had thereafter decided to stay, when he then well knew at the time he had left Clarksville, Tennessee on August 21, 1980, that he had not intended to return to Clarksville.

3. On or about November 3, 1980, in the Middle District of Tennessee and elsewhere, for the purposes of executing the aforementioned scheme and artifice to defraud, and in attempting to do so, THOMAS O. ROBINSON, JR. and ALEIDA L. ROBINSON did cause to be delivered by the United States Postal Service, according to the direction thereon, a letter addressed to Ray Brashears, 1218 Murfreesboro Road, Nashville, Tennessee 37217, containing a notarized proof of loss by THOMAS O. ROBINSON, JR., against Allstate reaffirming the loss by fire to their residence, and reaffirming the itemized list of property destroyed by the fire originally submitted to Allstate on or about September 9, 1980.

In violation of Title 18, United States Code, Section 1341, and 2.

COUNT FIVE

The Grand Jury further charges:

On or about August 21, 1980, in the Middle District of Tennessee, THOMAS O. ROBINSON, JR. did unlawfully make a firearm as defined by Title 26, United States Code, Section 5845, namely a destructive device consisting of an explosive or incendiary bomb assembled from an electric range, a cooking pan containing gasoline with gasoline trails leading from the stove, and a portable electric fan, all located in a residence at 1561 Liberty Church Road, Clarksville, Tennessee, which firearm was not registered to him in the National Firearms Registration and Transfer Record as required by Title 26, United States Code, Section 5841(a).

In violation of Title 26, United States Code, Section 5861(f).

COUNT SIX

The Grand Jury further charges:

On or about August 21, 1980, in the Middle District of Tennessee, THOMAS O. ROBINSON, JR., did unlawfully possess a firearm as defined by Title 26, United States Code, Section 5845, namely a destructive device consisting of an explosive or incendiary bomb assembled from an electric range, a cooking pan containing gasoline with gasoline trails leading from the stove, and a portable electric fan, all located in a residence at 1561 Liberty Church Road, Clarksville, Tennessee, which firearm was not registered to him in the National Firearm Registration and Transfer Record as required by Title 26, United States Code, Section 5841(a).

In violation of Title 26, United States Code, Section 5861(d).

A TRUE BILL:

/s/ BARBARA M. HOLZMAN

FOREMAN

/s/ JOS B. BROWN

UNITED STATES ATTORNEY

[Summation By Respondent's Attorney]

[657] MR. DURHAM: May it please the Court, Counsel, ladies and gentlemen of the jury, I, like Mr. Dalton, appreciate the time and effort you devoted to this case.

It has been a hard case personally for me. I am sure it has been much harder for Mr. and Mrs. Robinson and their family. In just a few moments you will begin the task of what is going to be extremely important for you.

I don't need to remind you how important it is that — how difficult, as I said, it is going to be for you to do.

[658] In this case, we have two citizens, out-of-state residents, who live in California, no connection or ties to this county. These events begin to unfurl themselves, and in just a few minutes I am going to elaborate on that.

Before I forget, my theme in arguing this case to you, I believe, is going to be that the Government has a duty to be fair. They have a duty to prove their case. And they have a duty to prove it, if they are going to prove it, fairly and squarely. And in this case, they haven't played straight with you members of the jury.

I will show you why in a minute or so. Now, in my argument, I am going to tell you what I remember the evidence is. And if I am misstating or forgetting any part of it, of course, your memory will be best.

You should follow your memory and not what I say. Let's start with the Guthrie case, the Northern Bank case. Exhibit 36 comprises the Northern Bank documents.

These exhibits, as Judge Wiseman said, you will be allowed to take back to the jury room. I hope those of you making notes, I hope you make note to particularly look at this.

[659] Mr. Taylor said that he had the lease and that he knew Mr. Batson was the owner of the property. You will notice the instrument which is claimed was a misrepresentation.

Now, I point out here, it must be a material misrepresentation. Judge Wiseman, I believe, is going to tell you in his instructions to you that you will be able to follow closely that it has got to be a material misrepresentation for it to constitute an offense, along with some other things like knowingly and willfully made, that sort of thing.

They have a itemization in here of just a few items. Here it is right here. These items right here start out: 7 counter stools, 25 chairs, 4 double booth tables, about 31 items here.

Now, another one of the exhibits is the lease, Batson's lease. You will notice that that is a long list of items that Mr. Taylor said he had. He had the Batson list.

What has happened. What is inferentially and fairly obvious to me is that they started and copied just—because they are in sequence—in the exact order as in the lease. They copied these documents onto this personal property lien.

[660] They just copied a few off the Batson lease. So when Mr. and Mrs. Robinson came in, the bank had prepared all these papers. They came in, having worked up their loan, and signed the loan.

Just to show you a little bit more about how that operated, the bank, in addition, took two mortgages. There was a first mortgage on the property that was to the lender, national mortgage company, in Memphis. I don't know the name of the company. It was some \$30,000.

Then the bank took a trust deed on February 26, 1979. In that mortgage, the bank says, "Document is presented that we certify that we are the owner of the title and the same is unencumbered." That means there is no mortgage on it.

The bank knew there was a first mortgage on it. Later, when they drew the \$10,000 mortgage, which the bank had an earlier mortgage on it, "We further covenant and warrant that the property, that is the same, we have a good right to convey it, and the same is unencumbered," meaning no mortgage.

The bank itself had to execute deeds that the real estate is not mortgaged, when they know it is. It seems to me to be a fairly obvious [661] inference, what they have done, obviously they typed just a few—if they really believed it in the security instrument, why didn't they type all of them?

They typed 25 of the hundred, 200 things, whatever there are, on that lease. If you will, when you go back, please compare the lease, Exhibit 23, with the bank documents, Exhibit 36.

Ask yourselves, clearly a question for you to decide, as the judge will tell you, "Was this a material part of that transaction?"

It was a part, wrong, signed improperly, but we don't have strict liability. A person's state of mind is on trial here. This is what you are trying everybody here for.

You are not trying them for submitting an item for a grandfather clock when they didn't own a grandfather clock. If you were, they would be guilty. They would plead guilty. They are guilty of that.

You are trying them for what is their state of mind. Did they intend to make a material misrepresentation to the bank in order to obtain credit? If so, they are guilty. If the state of mind is not, then they are not guilty.

[662] Let's move on to the second item, the Guthrie, Kentucky fire. In Guthrie, Kentucky, only Mr. Robinson is charged. He is only charged with mail fraud.

He is charged with knowingly, deliberately, with intent to obtain unlawfully, again submitting through the United States mail, a claim that he knows is fraudulent and false. That is what the issue is. That is what I am addressing.

Now, I think — let me start over. We don't have any duty to prove ourselves not guilty. The Government has the duty to prove us guilty. How does that apply?

All that insurance stuff, there was some talk about lawsuits, questions about paying the money in to court. That is not for us to bring up. That is for the Government to show you, give you the full picture. And whether it be a matter of aggressive trial tactics or negligence, they haven't done that.

They haven't given us—and it is important—they haven't done it. And it is important. How do these witnesses get here to testify for the Government?

How did that lady who got there testify [663] that on one occasion, while she admitted as many as six arsons in the community of Guthrie, which, I gather—and there is evidence that it is a fairly small area—here is what common sense tells you, and the evidence shows.

Agent Cooper goes to Guthrie and talks to everybody. I bet you, for every one person that took the witness stand, he interviewed several people that didn't. Because that is his job. He sits down and says, "Now, Miss Cunningham, you work here. During your lifetime, have you ever heard Mr. Robinson say anything about a fire?"

"No, I don't think so. I can't remember. Oh, yes, one time he said, if you take a match and strike it—we were talking about the fire, we were talking about the fires in the community—you take a match and strike it, and let the cigarette burn out, one end lit, and let the cigarette burn here, and you have matches, that is the way a fire can occur."

Here is what the agent does traditionally, I think, and I think this is a reasonable inference. He writes down: Brenda Cunningham, October 1979, stated defendant told her how fire could occur by lighting a match, et cetera, with [664] a cigarette.

So, when the trial comes up in March 1982, Brenda Cunningham gets a subpoena. She comes to Nashville, Tennessee. She lives off—some of these people have moved to Pennsylvania.

She gets outside there, and they say, "Miss Cunningham, I am Joe Doe, United States Attorney. Read this, please."

She looks at this statement on such and such a date: Defendant, a year and a half ago, told me the fire could be started in this and that way."

"Did you give that statement?"

"Yes."

"Is that statement true?"

"Yes, sir."

"Fine. Just have a seat and we will call you when we need you."

Two or three days into the trial, she comes marching up. "Miss Cunningham, do you know the defendant? Point at him," like some man ought to be in a prison uniform.

"Yes, I do."

You can imagine how it goes. "Did he ever discuss arson with you?"

"Why, yes, he did, sir." She is scared to [665] death. And on and on. That is an exaggerated case of the Government's behavior. And they have got to prove their cases. I am not getting on them so much as I am a few other things.

Like this neighbor, they talked to every neighbor. In Brenda Cunningham's case, surely Mr. Cooper knew there were fires going on up there. But in the statement, did he say that this was during the period of time that there were numerous fires?

MR. WASHKO: Your Honor, there is no testimony about Brenda Cunningham, and he has been going on about how we interview people. I think it is incompetent. I think I have sat through enough of that.

THE COURT: Overruled. Ladies and gentlemen, you are the judges of what the testimony was.

MR. DURHAM: That matter wasn't brought out by the United States Attorney or, as far as we know, anywhere else. They bring them in that way.

When the gentleman from Clarksville was interviewed by Mr. Cooper, he said that Mr. Robinson told him he wanted him to go in business with him, \$16,000 would be his share, one-third share.

And they talked about it. And Robinson [666] said, "Well, we could have a fire. That would wind up the inventory." I don't know what context it was taken in.

After all this went out, it seemed to me the witness, first time he didn't tell Mr. Cooper about it, and later he went back and told Mr. Cooper he took it in a negative context, he took it in a manner that it could be that Mr. Robinson was insinuating something.

They talked to neighbors. One lady said, "I live a couple houses down, or a block or two away." In a block of several directions, they must have talked to every neighbor—every neighbor. That is what they come up with.

At the same time, there are all these fires going on up there. What would be more natural than saying, "Well, I could"—how could that be so sinister? "I could have a fire and everything burn down."

Maybe he might have thought there were five other fires. When a witness says, on cross-examination, there are six other fires in that community, and the Government has an opportunity to bring somebody back, who lived there, and say, "Oh, no, this is the only fire," the things that [667] the defense brings up in those instances are many times left unrebutted, when the Government has the power to rebutt [sic] them.

They are the ones that bring all the witnesses in from San Francisco and around Pennsylvania, and they have got the resources and investigative powers to do more than just bring you a young lady from the truck stop to say he told her how a fire might be started, without putting on more evidence.

How else has the Government been unfair? I think it was inadvertence by Mr. Washko, in his argument, talking about a microwave oven. In Exhibit 16, which is the inventory submitted by Mr. and Mrs. Robinson—please write that down—there is no claim of a microwave oven. We never claimed that.

They tried to confuse you about the race car. The race car wasn't insured. It burned up without insurance. Don't you know, if it had been insured, they would have let you know.

How else is the Government unfair? The Fontaine tractor-trailers that burned up, they were Mr. Gautney's, as far as the evidence goes.

I asked the witness that on cross-examination. [668] There was no evidence that they belonged to Mr. Robinson. What did he do? That night, they say, he pulled the trailers up. And yet Mr. Gautney was the person who Mr. Robinson was not getting along with. Why didn't they bring you that evidence?

This list of contents, now, no jury in the world, including yours, would convict Mr. Robinson for arson in Guthrie, Kentucky. He left the building with another person. And his daughter was there.

They bring you one witness who says that he told him to tell the truth. I couldn't believe they brought that witness and tried to imply something sinister about it, by adding innuendo or something.

In Kentucky, the policy was in the amount of \$50,000. The amount claimed was \$71,275. In Tennessee—if you want to, this is important, if you write this down—Kentucky, it was \$71,275, and the policy was \$50,000.

In Tennessee, it was \$106,150, on a document that says, "This is the first list and subject to revision." That is Exhibit 16. \$30,000 was all the insurance that they had. And he claimed [669] \$106,150. What does that mean? What are the ramifications and what does it mean?

It is common sense. You or I have a house fire. The house, let's say, was worth \$70,000. Any home in the world practically, assuming it hadn't been looted, is going to have a certain, I would guess — and it is just a guess, no evidence, and I don't want you to think I am an expert — but 50 to 100 percent of the value of the home or maybe more is going to be furnishings. You ladies know more about that than I do.

I know, if you or I started looking around the house, we would come up with a lot of items. In the Tennessee fire, he submitted, said, "Yes, this is the first draft, \$106,000." And the policy is \$30,000.

The point is: Was it material? So what if it was a grandfather clock misstated out of that inventory. Would you like to be convicted of a felony and found guilty in this Court when your house burned down and you were 2,000 miles away, when you sent in a grandfather clock and didn't have one? Would that be fair?

What would be your intent? So was it material, all these things? What they have done in this list, [670] and here is where it is important, where the Government is not trying to be fair.

By the way, all those statements, I don't know how many statements we heard of Mr. Robinson, they were all about the arson. Did they ever give him a chance to explain about these sorts of things, about mail fraud?

Did they ever give this man an opportunity in their many, many statements they took at the time to say, "Well, I had two bedrooms sets."

Here is the picture, Exhibit B. You saw this. I will show you Exhibit D. And B was the one bedroom set. They are the same. They are all furniture that burned up in the fire.

Did the Government say, "What did you have? Can you show us any proof, Mr. Robinson?"

No. He was in the state of California, transacting business by mail. When he came to Tennessee in October, or shortly after the fire, within a month or so, they interviewed him about the arson.

They didn't say, "What is this? Do you have a microwave oven? What is this microwave oven? What about these bedrooms? What about this?"

The furniture and clothing, all that [671] clothing out on the lawn, testified to by Mrs. Baxter, "What about your clothing?" They never gave him a chance to explain.

They said, "We want to talk to you about the arson," and led him to believe he was a suspect, and let him go back to California and let him be there.

Then, the next thing that happens is, all these federal agents come into his apartment and take pictures of everything. And have they matched those up? No.

Now, materiality, particularly in the Tennessee fire, is extremely, extremely important. \$106,000 was claimed, but he only had \$30,000 insurance. It is the first draft, says on that cover letter, Exhibit 36, it is subject to revision.

Now, would you like to get indicted for that, without the Government being fair, and being able to explain, have him explain before you, members of your own community, rather than before the agents?

They tried to prove him guilty of arson, Ms. Hildreth and this gentleman, and they couldn't. So, without any explanation, they have indicted [672] him for a fraudulent crime.

I submit to you that the Government hasn't proved the materiality of either the bank statement or the Tennessee fire, because it was over \$30,000.

Just like the ice maker thing. They didn't say water and ice maker. Every refrigerator makes ice. They want to make the whole case practically on that.

They talk about the race car. All right. Now, let's move to something I think is extremely important about the Kentucky fire. It was \$50,000 worth of insurance. Mr. Robinson claimed \$71,000.

Now, Exhibit 24 is the Kentucky inventory. I want you to go through that and look at those items line by line. I think you need to, when you decide this case.

Here is what we base our case on. You will notice that he has got the names of the places he bought things, or the information was readily available to him through the insurance company, could ask for it.

Yet the insurance company, by the way, as the evidence shows, paid the claim in court. They said, "We don't own it," as far as the [sic] [673] goes. But somebody does. They didn't contest the inventory. They have a right to.

Now, the Government has picked Hester Batteries, and the man said, with the battery company, that they gave you some—"I gave you \$10,000," and the man came and said, "Well, my records show \$33,400," or whatever, you remember, in the exhibit, and they had figures.

It was short. Would you like to depend for your life only on that man's records? That man, who had been approached by Mr. Cooper, and a statement taken from him, brought here a year later, and who had—the itemization that Mr. Robinson sent in said Western Kentucky Tires. It didn't say Kentucky Bandage.

Were there other tires he bought? Like the man said, he took the tools away from Kentucky. Here is what happened here, one would fairly and reasonably surmise: Went to Mr. Joe Doe, "Did you work for Mr. Robinson?"

"Yes, I did."

There are standard things you look for in an arson case. Has the person moved the property out of the premises before the fire; was the person in financial need; is the person, does he have [674] gambling debts, and that sort of thing you would look for, motive.

And you say, "Did he take anything home?"

"Yes. He took his tools home."

"Did he do this?"

"Yes. He took his tools home."

So you write down: So and so says he took the tools home. Then he gets a subpoena a year later and is put on the witness stand, scared to death again.

He worked for Mr. Robinson. He says, "Yes. I remember, two weeks before the fire, he took two boxes of tools home."

And the United States Attorney smiles and says, "No further questions."

Now, that is the way cases are built. I can see Mr. Robinson in California, and how this snowball started small and got larger until it mushroomed into the type of evidence you heard today.

Now, here is what the Government, to be fair with the jury, should have done. They should have taken those items in the Kentucky inventory and just proved them. Why let the defendant disprove them, give him an opportunity to explain?

[675] If not that, they should have disproved them to you. They brought Kentucky Bandage and Hester Battery and maybe one or two other items, out of hundreds of them, not hundreds, but pages of them, single-spaced pages.

Why don't they bring the people, and why don't they prove their case? Why, when we are looking at \$71,000 on a \$50,000 policy. You have got \$21,000 overlay.

Mr. Dalton talked about the causes of the fire. I am not going to—obviously, I can't argue about Bill Irby and Glen Gautney, Baxter, and the Robinson connection.

There were two fires that night, two related investigations, Irby and McDougal. Bill Irby was getting his mail there, and his name was on the mailbox. He lived there.

We have two fires together, and we have the Robinson fire. It is uncontroverted in the evidence that Mr. Robinson was threatened by Mr. Gautney.

Here is one other thing. Why didn't they bring Gautney in to let you hear his testimony? Or Joe Weatherford?

MR. WASHKO: Objection. There is no [676] missing-witness rule here. They could have asked for it. Those witnesses were equally available to the defendants.

THE COURT: Sustained.

MR. DURHAM: The Government has not brought you all the proof that they should to show you guilt and innocence.

They brought you the type of proof that they carefully filtered, to try to infer circumstantially the guilt of Mr. Robinson. Shouldn't they have gone through and brought you evidence of more situations where there have been false claims, rather than one or two for Kentucky?

MR. WASHKO: Objection. May I approach the Bench?

THE COURT: Just a minute.

Ladies and gentlemen, it is not the responsibility of the Government to produce every available witness. It is only the responsibility of the Government to produce such witnesses as you, in your solemn and exclusive weighing of the evidence, to find these defendants guilty beyond a reasonable doubt. And you will be the sole and exclusive judges of that. All right.

MR. DURHAM: Do you think bringing two or [677] three witnesses proves guilt beyond a reasonable doubt?

Do you think that the behavior of the Government in this case, and the evidence they have presented before you, justifies a verdict of guilty?

Members of the jury, there are two more things I want to hit on, and they are extremely important.

Number one, you know that this is not an automobile accident case or any type of civil case where, in those types of cases, you only have to prove guilt by what the lawyers call a preponderance of the evidence, where it is more likely than not they are guilty.

Some of you may honestly have a real conviction that if you had to write down a yes or no as to whether Mr. Robinson deliberately and willfully, and Mrs. Robinson deliberately, made false claim to the bank, trying to trick the bank, and trying to rip off the insurance companies with these statements. You might have a little "Why?" there.

You might think the odds are 55 percent, at least 50 percent. Some of you may not think so. But that is not the quantum of proof of evidence [678] that the United States of America has to bring in a criminal case.

That is a protection for you and me. That is the type of thing that our forefathers died on the battlefield for, to protect our system of justice, our peculiar system, to require the Government to not prove the case alone, but prove that beyond a reasonable doubt, beyond a reasonable doubt, and that is the standard of proof that is required.

Each of you, when you took your sworn oath, you 12 people who will be chosen to stand as a wall of liberty, and you have taken an oath that you would require the Government to do that. I am sure you will.

I hope you will, for justice's sake as well as Mr. Robinson's.

Secondly, in this case, I have a real problem with a jury, because neither one of the Robinsons took the witness stand.

Judge Wiseman, I am sure, will tell you, in his instructions, that you are not to hold that against the defendants, that that is not to be in any way considered on this question of innocence or guilt.

[679] No inference can be drawn adverse to Mr. and Mrs. Robinson from that. But, members of the jury, that is beyond our usual and customary experience.

Because all of us get through this life every day using our common sense, and we know that if we were charged with something, or if our little boy did something, and we

said—whatever your son's name is—“Joe, did you get the candy?” and he won't tell you, that meant something you could draw an adverse inference against him.

It is natural for people who are innocent to take the witness stand. So I want to ask you to listen to what the Court said. We have plead [sic] not guilty, which doesn't require us to prove anything, and we rest on the proof that was made on the cross-examination of the Government's witnesses, on all the exhibits which we have here, and on the testimony of the Robinson family and the Robinson neighbors.

Based on that, we ask that you return a verdict of not guilty. Thank you.

[Oral Ruling Permitting Rebuttal]

THE COURT: All right, ladies and gentlemen, let's take a short recess at this time. You all [680] step back into your jury room and we will take about 10 to 15 minutes.

I have some matters to take up with counsel. You all remain seated.

(Whereupon, the jury exited the courtroom)

THE COURT: All right. We discussed in the chambers conference this morning, when we talked about the charge, but then I did not give you an opportunity, Mr. Durham, to, at the close of all the proof, to renew your motion for a Judgment of Acquittal, made earlier at the conclusion of the Government's proof.

The record will show that you made that motion and that the Court denied the motion. Now, Mr. Washko, do you want to be heard?

MR. WASHKO: Yes, Your Honor, I do. Several things in that argument I took quite a bit of offense to. He comes up and starts going to the jury, and he, as in his ethics, said they tried to bring proof of other claims that they sub-

mitted were false, and he stands as an attorney, and he knows darn well that the Government fully intended to bring other claims that were false.

Mr. Durham, I think, has stepped beyond the [681] bounds of good argument when he has talked about the defendants were not given, by the Government, the right to explain.

I think he has opened the door and has in fact allowed me to comment.

THE COURT: That is the part that bothers me.

MR. WASHKO: That bothers me. I think he opened the door.

THE COURT: Yes. Mr. Washko, I will tell you what, the Fifth Amendment ties the Government's hands in terms of commenting upon the defendants' failure to testify. But that tying of hands is not putting you into a boxing match with your hands tied behind your back and allowing him to punch you in the face.

That is not what it was intended for and not fair. I will let you say that the defendants had every opportunity, if they wanted to, to explain this to the ladies and gentlemen of the jury.

We might get reversed on it. Mr. Durham opened the door not less than four times in his argument on that question. I will let you comment on it in response.

MR. WASHKO: That would be the only comment I had.

[682] THE COURT: All right. Let's take a ten-minute recess.

(Brief recess)

THE COURT: Yes, sir.

MR. WASHKO: I have one other matter. I think, as I indicated to the Court, Mr. Durham's argument with respect to the proof of loss was improper, and I would ask that he tell the jury that we made no attempts to bring other false claims.

And I would ask the Court to give me the opportunity, or the Court can give an instruction, that in fact the Government attempted to bring in other proof of other claims, which the defense objected to, and which was sustained, or allow me to argue that.

But Mr. Durham clearly knew that we had attempted to bring in other claims and stood here and said we never made such an attempt. I think that should be instructed upon.

THE COURT: What do you say, Mr. Durham?

MR. DURHAM: If Your Honor please, I appreciate the opportunity to be heard before I am subject to be condemned.

What I was talking about was not other [683] insurance claims. I said they proved that with Hester Batteries and Western Bandag [sic].

I was specifically talking about Exhibit Number — whatever it is — where there is page after page of line items of this and that claim, and Mr. Washko misinterprets and thinks I am trying to tell the jury that they never proved a claim about a refrigerator or car.

Why would I even infer there was any other claim made? That would be contrary to my client's interest.

THE COURT: Yes. Mr. Washko's application for that will be denied.

MR. WASHKO: Yes, sir.

THE COURT: Anything else?

MR. WASHKO: I think Mr. Durham had a question, whether or not we were going to have rebuttal and instructions and then lunch.

THE COURT: No. How long is your rebuttal argument going to be?

MR. WASHKO: It will be before noon.

THE COURT: Once I charge the jury, I will have to keep them together. I think, after you finish your rebuttal, I will let them go to an early lunch and bring them back and instruct them. [684] Anything else?

MR. WASHKO: No, Your Honor.

THE COURT: All right. Bring the jury in.

(Whereupon, the jury entered the courtroom and was seated in the jury box)

THE COURT: All right. You may proceed with your rebuttal argument, Mr. Washko.

[Government's Rebuttal Summation]

MR. WASHKO: Ladies and gentlemen, Ms. Hildreth and myself, we represent the United States of America. We are representing the people of it.

Our obligation is to ensure that the innocent are protected and the guilty are prosecuted to the fullest extent of the law.

Mr. Durham made representations that we didn't play fair. We have an ethical duty to play fair. What we know through our investigations, matters that are exculpatory, there is case law, and an abundance of it, the Court rules require it, that we turn it over to the defendants.

We don't hide. We don't play trial by ambushes. The Government has subpoena power and the defendants have subpoena power to bring anybody he wants.

That is why Your Honor has sustained the [685] objection about not bringing other witnesses, because the defense can explain through their witnesses anything they want to explain.

Mr. Durham has made comments to the extent the Government has not allowed the defendants an opportunity to explain. It is totally unacceptable.

He explained himself away on tape right into an indictment. He explained himself to the insurance investigator, to the extent that he wanted to.

He could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain.

Several things that I believe are misstatements of evidence, here again, you are the finders of what the evidence is, and finders of fact. First of all, let's get back to the bank case.

Mr. Taylor testified he never had the lease agreement itself. Obviously, if he had the lease agreement, he would have known that the defendants didn't own that property.

What he was provided was a copy of the inventory. Sure, he knew Mr. Batson owned the truck [686] stop. There is no question about that. Mr. Robinson was buying it. And just like when you buy a car from Beaman Pontiac or wherever you are going to buy the car, you buy a car and go to the bank for a loan.

The bank takes that car that you are buying as collateral. So sure, the bank is going to know I am buying my car from Beaman Pontiac.

Sure, Mr. Taylor knew that Mr. Batson owned the property, but he believed and relied upon the representations of those two that they were buying it. And when they were buying it, he, Mr. Taylor, was going to take the security interest in that property.

He in fact filed a security agreement, the UCC-1 that you may have heard reference to, which was filed in Kentucky. That is an exhibit with the bank documents.

The banker never knew, and I think he brought this out, he never knew they didn't own it until after the fire.

Now, with respect to, again, our witnesses, it was Mr. Knight, we can't help that he has a felony conviction.

It was Mr. Robinson who was doing business [687] with Mr. Knight. Mr. Knight was protecting his own source of income, selling parts, so he did it.

We have to take our witnesses from the people that that man has dealt with. We haven't dealt with him. That man did.

Now, with respect to the batteries, Mr. Allen told you he picked up batteries. I am not impeaching my own

witness. Mr. Allen also told you he said, "I couldn't tell whether they were new, used, or inoperable, just a big blob of lead."

Now, what do we know from the defendant's own statements that he gave to Mr. Thompson, and first Mr. Allen? First, we know Mr. Allen gave him a \$300 credit, and his claim shouldn't have been a thousand.

When he heard from Mr. Thompson, when he asked that question, "What do you keep in the metal shed behind your house?"

"Oh, I have those—I have batteries there that I had, from the truck stop."

That is where we get the distance of the batteries from Clarksville, from that man's own mouth.

Now, Mr. Durham, again he is wrong, but he [688] alluded to it, about the hobby race car, the car that sat in the garage, that it wasn't under proof of claim.

I have got Exhibit 8—or Exhibit 16. You take it back and look at it. On the inventory in the garage, very first item, hobby-class race car, \$7,000. I didn't mislead you. I have got an obligation not to mislead you.

I may misstate something of fact, because I am sitting here trying to go through the trial. You people have to decide, from the witness stand and from the evidence, what is the evidence.

What I say is not evidence, can't be considered as such. But I will not try to trick or mislead you.

I don't know who Betty Cunningham is. I don't believe her name has ever come up during the course of this trial. Mr. Durham alluded to Betty Cunningham. Who? I don't know.

If he thought Betty Cunningham had anything to add, he could have brought her. I don't know who she is.

With respect to the post office and change of address, It will tell you why he had the change of address. He wasn't coming back to Clarksville to [689] pick up his mail. He

knew he wasn't. That is why he took the post office change of address on August 18. Remember what Mr. Ross said, August 18.

Now, if Mr. Robinson was planning to come back to his house, as his daughter stated, he wouldn't have had to have a change of address.

What he planned or doing, here is what happened: When his house burns down, he needs a place where the mail is going. So it is going to go to the Clarksville Post Office and, from there forwarded to California. That is what that shows you.

Chris didn't see a pot. You decide whether he claimed he saw a pot or not. Michael did. Michael saw it the day before, saw Mr. Robinson putting gasoline in it. It already had oil in it. That is going to make it take a little longer to boil over.

This is an 11-year-old boy, who is good friends with Mr. Robinson's son, Peter. Is he going to lie to you? Did he have the motive to lie to you? You judge his credibility.

You are the finders of fact. You decide the credibility of that testimony.

[690] The bank knew, Mr. Durham, the bank knew the first mortgage and put in the deed of trust. There was no other security. That is totally irrelevant.

Sure, the bank knew. We are not saying that Mr. Robinson or Mrs. Robinson made a false statement because of the deed of trust. That isn't in issue.

What is in-issue is the inventory. Mr. Durham alluded to not bringing in civil matters in the judgment. Again, that is totally irrelevant. Again, he could have brought that in, if he had wanted to.

This is a criminal case, not a civil case. Who gets the money from Great American? That is not in issue. All that was for smoke.

We have a fan here to blow that away. That is irrelevant. It shouldn't be considered. You should consider the

evidence we had. You take all of that evidence and put it together, and I believe the Government has shown, the Government has played fair and has shown the defendants to be guilty, beyond a reasonable doubt.

Now, Mr. Dalton talked about: What is reasonable doubt? He said, when he alluded to [691] my analogy of a puzzle, again, he misstated what reasonable doubt is.

He said, "If there is a single piece missing, that is reasonable doubt." Not so. See that bald eagle? Pretend that is a puzzle cut into numerous pieces. And out of the bones of those wings you have a little piece missing. You still know, when you have all the other pieces put together, that that is an American bald eagle.

And you can put logic, you can use your logic and use your heads and put two and two together and come up with four.

So even though there is a piece of wing missing, you still know that is an eagle. And when you put this proof together, you still know that those two defendants are guilty beyond a reasonable doubt.

I thank you.

In the Supreme Court of the United States

No. 86-937

UNITED STATES, PETITIONER

v.

THOMAS O. ROBINSON, JR.

ORDER ALLOWING CERTIORARI. *Filed February 23, 1987.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Sixth Circuit* is granted.

PETITIONER'S BRIEF

5

Supreme Court, U.S.
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APR 9 1987
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No. 86-937

In the Supreme Court of the United States

OCTOBER TERM, 1986

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v.

THOMAS O. ROBINSON, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, after defense counsel has argued in summation that the government prevented the defendant from explaining his side of the story, a prosecutor may respond in rebuttal that the defendant was free to testify had he chosen to do so.

2. Whether the "plain error" doctrine applies to errors affecting constitutional rights.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-937

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS O. ROBINSON, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 794 F.2d 1132. An earlier opinion of the court of appeals (Pet. App. 15a-27a) is reported at 716 F.2d 1095.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a) was entered on July 9, 1986. A petition for rehearing was denied on September 9, 1986 (Pet. App. 29a-30a). On October 28, 1986, Justice Scalia

extended the time within which to file a petition for a writ of certiorari to and including December 8, 1986. The petition was filed on December 8, 1986, and was granted on February 23, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, respondent was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341.¹ Each count related to a fire and a subsequent insurance claim. Respondent was sentenced to a five-year term of imprisonment, all but five months and 29 days of which was suspended in favor of a five-year term of probation. J.A. 1-2; Pet. App. 15a-16a.

1. The evidence at trial showed that in early 1979 respondent leased a truck stop in Guthrie, Kentucky. At that time, he purchased a \$31,000 fire insurance policy on a wrecker and the contents of the garage at the truck stop. Tr. 309-310, 317-319. Respondent had previously told a man whom he had asked to become a partner in the truck stop that if the business turned out to be unsuccessful, he had a large inventory and could burn it. Tr. 485-487. Throughout 1979, respondent was consistently delinquent in

¹ Respondent was tried together with his wife, Aleida L. Robinson. She was convicted on one mail fraud count and was sentenced to two years' probation. The court of appeals affirmed her conviction (Pet. App. 15a-27a). Both respondent and Mrs. Robinson were acquitted on two counts of making false statements to a bank for purposes of obtaining a loan, in violation of 18 U.S.C. 1014. At the close of the evidence at trial, the district court dismissed two other counts charging respondent with making and possessing a destructive device, in violation of 26 U.S.C. 5861.

paying his rent, and by September 1979 his business had deteriorated significantly. Tr. 313, 359, 495, 512-513.² On August 30, 1979, respondent increased the insurance coverage on the garage contents from \$31,000 to \$50,000. Two days later, on September 1, 1979, there was an explosion and fire in the garage. Respondent subsequently submitted an \$80,000 insurance claim for the loss of the wrecker and the contents of the garage and an adjoining office. Tr. 318-319, 341, 344; Pet. App. 10a-11a.

The day after the fire, respondent's insurance agent, Aaron Williams, inspected the burned-out areas. Williams observed that tools and equipment he had previously seen in the garage were missing, that respondent's insured wrecker, which was usually parked in front of the truck stop, had been destroyed in the fire, and that respondent's uninsured race car, which was normally kept in the garage, had not been damaged.³ Williams also observed that the office area of the garage did not contain the remains of a color television, an adding machine, or a copying machine that respondent later claimed he had lost in the fire. Tr. 322-323. Shortly thereafter, investigators discovered that a large quantity of fire accelerant had been poured on the floor where the fire had started and that a desk in the office area contained no files or debris of any kind. Tr. 442-443, 457-458, 476-484; Pet. App. 11a.

² As of September 1979, respondent's gasoline supplier held a total of \$28,000 in bad checks from respondent. Tr. 495, 499.

³ According to a local police officer who had previously worked for him, respondent abruptly removed his race car and personal tools from the garage two or three weeks before the fire. Tr. 361-363; Pet. App. 11a.

During the next several weeks, respondent asked salesmen with whom he dealt to prepare false invoices showing that he had purchased an air compressor and more than \$10,000 worth of tires, so that he could submit those items as part of his proof of loss to the insurance company. Tr. 410-417, 429-430; GXs 24, 25; Pet. App. 11a.

Approximately a year later, respondent's house in Clarksville, Tennessee, was heavily damaged by arson about an hour after respondent had left the premises with a large U-Haul truck filled with most of his household furnishings. Tr. 50-51, 252-260, 267. Firefighters and investigators inspected the premises shortly after the blaze had been extinguished. They discovered that a large, two-handled cooking pot containing gasoline had been left on a lit stove, that an electric fan had been left running near an air vent, and that "rapid rise" gasoline had been spread throughout the house. They also determined that the doors and windows were locked, that the house was sparsely furnished, and that there was nothing in most of the dresser drawers or closets. Tr. 59-60, 64-65, 70-74, 78-85, 91, 99-107, 131-132. The authorities later learned that the home security system had been disconnected prior to the blaze. Tr. 154-156, 214; Pet. App. 11a-12a.

During the month preceding the fire at his home, respondent had packed family belongings, moved household furnishings from his house, and held a yard sale that was attended by several neighbors. Tr. 182, 190, 202, 212, 226, 252. Respondent explained to one neighbor that he was moving his family to California, but he told another neighbor that his family was going there for a visit. Tr. 183, 204.⁴ Two

⁴ Three days before the fire, respondent filed a change of address with the post office. Tr. 277-278.

or three days before the fire, respondent began loading his household furnishings into a large U-Haul truck with the help of a 17-year-old neighbor, Christopher Edwards.⁵ Edwards also helped respondent move older furniture and appliances from the garage into the house. Tr. 257. The day before the fire, Edwards' 11-year-old brother saw respondent draining gasoline from his race car into a large, two-handled cooking pot. Tr. 232-233. During the early morning hours immediately before the fire, Edwards helped respondent load the truck with clothing, beds, a grandfather clock, a dining room set, a master bedroom set, a microwave oven, and a double-door refrigerator-freezer filled with meat. Tr. 256-266. Edwards remained with respondent and his family until sometime after 3 a.m., when they were ready to leave for California. While Edwards and respondent's family waited outside, respondent remained alone in the house for five to ten minutes. After respondent left the house, he and his family departed in the U-Haul truck and an automobile. An hour later, neighbors discovered that respondent's house was on fire. Tr. 214, 227, 230, 266-267; Pet. App. 12a-13a.

Respondent subsequently contacted the company that had insured the Clarksville house. He stated that his family had left Clarksville to vacation in California, but that they had decided to remain there because of the fire. Tr. 135-137. He provided the company with a list of property that had allegedly been lost in the blaze. Tr. 137-139; GX 16. When he was interviewed by investigators the following

⁵ On August 16, 1980, five days before the fire, respondent rented a 24-foot U-Haul truck—U-Haul's largest truck, which is designed to hold eight rooms of furniture. Tr. 163-164.

month, respondent denied that he had set fire to his Clarksville house or that he had removed clothing and most of the furnishings from the house. He claimed that he had simply moved "some things" to California for his daughter, who was attending college there. GX 15. Respondent thereafter mailed the insurance company a proof of loss statement and a claim for \$200,000, including a \$106,500 personal property claim. Tr. 137-140; GX 18. Property that respondent had included in his insurance claim was later discovered by authorities in his California residence. Tr. 177-178, 183-185, 203, 215-219, 235-243, 260-266, 381; Pet. App. 13a.⁶

The evidence for the defense consisted of the testimony of two of respondent's children (Tr. 515-562, 596-609) and a neighbor (Tr. 562-589) concerning the events surrounding the fires. In addition, respondent called a business associate, who testified that respondent had been current in his business dealings. Tr. 589-596. Neither defendant testified. Pet. App. 13a.

2. Petitioner's attorney began his closing argument by contending that the government had breached its duty to be fair to the accused and to "play[] straight" with the jury. Tr. 658; J.A. 11. He repeatedly returned to that theme, arguing that the government had unfairly "filtered" the evidence and had used a particular witness in order to "imply something sinister" about respondent's conduct. Tr. 662, 667-668, 674, 676; J.A. 14, 17, 21, 22. In addition, five different times in his summation defense counsel charged that the government had unfairly

⁶ Tools that respondent had removed from the truck stop garage prior to the fire there were also discovered in respondent's California residence. Tr. 368-372.

denied respondent an opportunity to "explain" his actions. Pet. App. 1a-2a. Near the conclusion of his argument, counsel stated (Tr. 671; J.A. 19):

Now, would you like to get indicted for that, without the Government being fair, and being able to explain, have him explain before you, members of your own community, rather than before the agents?⁷

Defense counsel also attempted to imply that there were weaknesses in the prosecution's case by pointing out the absence of evidence of "more situations where there have been false claims, rather than one or two for Kentucky" (Tr. 676; J.A. 22). Counsel made that argument even though the prosecution had attempted unsuccessfully, on several occasions, to in-

⁷ Defense counsel made other comments in a similar vein:

By the way, all those statements, I don't know how many statements we heard of Mr. Robinson, they were all about the arson. Did they ever give him a chance to explain about these sorts of things, about mail fraud? [Tr. 670; J.A. 18].

* * * * *

Did they ever give this man an opportunity in their many, many statements they took at the time to say "Well, I had two bedroom sets" [Tr. 670; J.A. 18].

* * * * *

When he came to Tennessee in October, or shortly after the fire, within a month or so, they interviewed him about the arson. * * * They never gave him a chance to explain [Tr. 670-671; J.A. 19].

* * * * *

Now, here is what the Government, to be fair with the jury, should have done. They should have taken those items in the Kentucky inventory and just proved them. Why let the defendant disprove them, give him an opportunity to explain? [Tr. 674; J.A. 21].

roduce precisely that sort of evidence. Tr. 141-148, 207-208, 351-352.*

After the defense summation, the prosecutor objected to defense counsel's argument that the government had not given respondent a chance to "explain." He requested leave to rebut that contention, arguing that the defense had "opened the door" on that issue. Tr. 680-681; J.A. 24-25. Despite ample opportunity to defend his actions or to object to the proposed rebuttal, defense counsel remained silent. The district court ruled that the prosecutor could answer respondent's contention that he had been afforded no opportunity to explain. The court stated (Tr. 681; J.A. 25):

Yes. Mr. Washko, I will tell you what, the Fifth Amendment ties the Government's hands in terms of commenting upon defendant's failure to testify. But that tying of hands is not putting you into a boxing match with your hands tied behind your back and allowing him to punch you in the face.

That is not what it was intended for and not fair. I will let you say that the defendants had every opportunity, if they wanted to, to explain this to the ladies and gentlemen of the jury.

We might get reversed on it. Mr. Durham opened the door not less than four times in his argument on that question. I will let you comment on it in response.

Defense counsel made no objection. Pet. App. 2a.°

* Defense counsel also argued that the jury could not draw any adverse inference from respondent's failure to take the stand. Tr. 678-679; J.A. 23-24.

° The prosecution also sought permission to inform the jury that the government, contrary to defense assertions, had attempted to bring in evidence of other false claims. Tr. 682;

In accordance with the ruling he had obtained from the court, the prosecutor began his closing argument with a rebuttal to the defendant's attack on the government's conduct. The prosecutor's argument included the following (Tr. 685; J.A. 27):

[Defense counsel] has made comments to the extent the government has not allowed the defendants an opportunity to explain. It is totally unacceptable.

He explained himself away on tape right into an indictment. He explained himself to the insurance investigator, to the extent that he wanted to.

He could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain.

Defense counsel made no objection to those remarks and did not request any cautionary instructions. The trial court later instructed the jury that a defendant has no burden to produce any evidence and that "no inference whatever may be drawn from the election of a defendant not to testify" (Tr. 694). Defense counsel stated that they had no objection to the court's instructions (Tr. 719-720). Pet. App. 2a-3a.

3. The court of appeals reversed (Pet. App. 15a-27a). Relying on this Court's decision in *Griffin v. California*, 380 U.S. 609 (1965), the court of appeals held that the prosecution does not have a right to make "direct comment on a defendant's failure to testify * * *, even if defense counsel has baited the prosecutor" (Pet. App. 20a). Moreover, the court held that the error was not cured by the trial court's

J.A. 25-26. Defense counsel objected to that request, and it was denied. Tr. 682-683; J.A. 26.

jury instructions and that, although the government's "evidence is strong," the error was not harmless beyond a reasonable doubt (*id.* at 25a).¹⁰

4. On March 4, 1985, this Court vacated the judgment of the court of appeals and remanded the case with instructions to reconsider the decision in light of *United States v. Young*, 470 U.S. 1 (1985). See 470 U.S. 1025 (1985). On remand, the court of appeals adhered to its prior judgment (Pet. App. 1a-13a). The court first held that the prosecutor's remarks constituted "a clear violation of the defendant's constitutional right not to testify" (*id.* at 3a). The court next distinguished *Young*, holding that the government's summation amounted to plain error. The court reasoned that it was freer to find plain error here, because *Young* involved only "ethical" violations, while the prosecutor in this case had violated respondent's constitutional rights (*id.* at 5a-6a). Moreover, the court stated that the prosecutor's argument in *Young* had focused on the prosecutor's credibility, while in this case the prosecutor's argument "directly placed the defendant's credibility into issue" (*id.* at 8a (emphasis in original)). Finally, the court determined that the evidence in this case, "though substantial, was not as overwhelming as in *Young*," a conclusion that the court drew from "[t]he fact that the jury did not find [respondent] guilty on all counts" (*ibid.*). The court of appeals concluded that because it could not find the prosecutor's remarks harmless beyond a reasonable doubt, plain error had been committed (*id.* at 9a).

¹⁰ The court of appeals affirmed Mrs. Robinson's conviction on the ground that the prosecutor referred only to respondent's failure to testify and thus did not taint the fairness of Mrs. Robinson's conviction (Pet. App. 25a-27a).

Judge Cohn dissented. He agreed that the prosecutor's summation was improper, but he concluded that the evidence at trial was too substantial to warrant a finding that the summation had influenced the jury. He noted that the jury's failure to convict respondent on certain charges suggested that it had not been improperly swayed by the prosecutor's argument. He also expressed doubt that the plain error standard for constitutional violations in summations should be different from the standard applicable to any other violation at trial to which no objection has been made. Pet. App. 10a.

SUMMARY OF ARGUMENT

I. In *Griffin v. California*, 380 U.S. 609 (1965), this Court held that a prosecutor's comments on a defendant's failure to testify at trial violated the defendant's Fifth Amendment privilege against compulsory self-incrimination. Purporting to apply the rule in *Griffin*, the court of appeals in this case concluded that the prosecutor's rebuttal summation constituted "a clear violation of the defendant's constitutional right not to testify" (Pet. App. 3a). The court's analysis is flawed in several respects.

First, the rule in *Griffin* does not prohibit every comment pertaining to a defendant's failure to testify. Rather, it forbids only those comments that ask the jury to treat the defendant's silence as evidence of his guilt. The prosecutor's rebuttal remarks in this case did no such thing. Instead, his remarks simply served to rebut defense counsel's claim that the government had acted unfairly in the case by depriving respondent of an opportunity to respond to the charges against him.

Second, the court of appeals ignored the context in which the prosecutor made his remarks. The remarks in this case were made in rebuttal summation, after defense counsel had charged that the government had prevented respondent from testifying. This Court has consistently held that if the trial process is to fulfill its truth-finding mission, a prosecutor must have leeway to respond to a defendant's arguments. The prosecutor's rebuttal was a fair and measured response to defense counsel's repeated attacks on the bona fides of the prosecution; it was not a gratuitous effort to invite the jury to infer that respondent must be guilty because he remained silent at trial.

Finally, the court of appeals was mistaken in its implicit assumption that rebuttal comments of this sort will, as in *Griffin* itself, impermissibly burden a defendant's assertion of his right not to testify. It is difficult to see how the kind of rebuttal made in this case could impose any burden on a defendant's exercise of his rights. And even if some incidental burden were entailed, the truth-finding functions of the trial process plainly outweighed that cost and justified the prosecutor's exercise of the right of fair reply.

II. Although defense counsel did not object to the prosecutor's rebuttal remarks, the court of appeals nonetheless held that it was free to review the asserted error when it was raised for the first time on appeal. The court of appeals distinguished this Court's decision in *United States v. Young*, 470 U.S. 1 (1985), in which this Court held that a similar claim of error did not constitute "plain error" and therefore was waived when it was not raised in the district court. The court of appeals held that it was

freer to find plain error in this case because the rebuttal involved a constitutional error, not merely an ethical violation.

The court of appeals' distinction between constitutional and non-constitutional errors misapprehends the nature and purposes of the plain error doctrine. That doctrine is a narrow exception to the contemporaneous objection rule, whose purpose is to ensure that objections to alleged errors are made at a time when those errors can still be corrected. There is no reason to exempt constitutional objections from this requirement. The plain error rule, codified in Fed. R. Crim. P. 52(b), permits a reviewing court to overlook the failure to object only when the error seriously affects the "fairness and integrity" of the trial. There is no basis to believe that constitutional errors are, as a categorical matter, more likely than non-constitutional errors to impair the fairness or integrity of the trial process. For that reason, this Court has regularly held that constitutional objections may be lost by the failure to press them at trial.

ARGUMENT

I. THE PROSECUTOR'S REBUTTAL DID NOT CONSTITUTE AN UNLAWFUL COMMENT ON RESPONDENT'S FAILURE TO TESTIFY

A. The Rule In *Griffin* Prohibits Only Comments That Characterize The Defendant's Failure To Testify As Evidence Of Guilt

1. The court of appeals' initial error in this case stemmed from its apparent belief that the rule in *Griffin v. California*, 380 U.S. 609 (1965), forbids prosecutors from making any reference at all to a defendant's failure to testify. That is simply not so.

Rather, as this Court has made clear, the rule in *Griffin* prohibits only those comments that "suggest[] to the jury that it may treat the defendant's silence as substantive evidence of guilt." *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976). The prosecutor's rebuttal argument in this case contained no such suggestion.

A close reading of *Griffin* confirms that the rule in that case is not as broad as the court of appeals suggested. The defendant in *Griffin* was tried for first-degree murder in a state that permitted the prosecutor to comment upon the defendant's failure to explain or deny any evidence offered against him at trial. When the defendant did not testify, the prosecutor asked the jury to treat the defendant's silence at trial as substantive evidence of his guilt. The trial court added considerable force to the prosecutor's argument by instructing the jury that a defendant "can reasonably be expected to deny or explain * * * facts within his knowledge," and that if he "fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence" (380 U.S. at 610).

This Court reversed *Griffin*'s conviction. To permit comments of that sort, the Court held, would "allow[] the State the privilege of tendering to the jury for its consideration the failure of the accused to testify" (380 U.S. at 613). Such a practice "solemnizes the silence of the accused into evidence against him" (*id.* at 614). Moreover, the Court held, comment on the failure of a defendant to testify "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Ibid.*

By its terms, the *Griffin* case forbids only comments that "solemnize[] the silence of the accused into evidence against him" (380 U.S. at 614). The Court confirmed this limiting principle in *Lakeside v. Oregon*, 435 U.S. 333 (1978). There, the Court held that a defendant's rights under *Griffin* were not violated when the trial court, over the defendant's objection, instructed the jury not to draw any adverse inference from the defendant's failure to testify. The defendant, who wanted the trial court not to refer at all to his failure to take the stand, argued—much as the court of appeals held in this case—that *Griffin* forbids *any* comment on silence. The Court disagreed, stressing that the scope of *Griffin* cannot be divorced from the Fifth Amendment premises underlying that decision. A necessary element of compulsory self-incrimination, the Court noted, "is some kind of compulsion" (435 U.S. at 339 (citation omitted)); and in *Griffin*, the Court stated, "unconstitutional compulsion was inherent in a trial where prosecutor and judge were free to ask the jury to draw adverse inferences from a defendant's failure to take the witness stand" (*ibid.*). But the judge's instruction in *Lakeside*—that the jury should draw no adverse inference from the defendant's exercise of his privilege not to testify—simply did not put pressure on the defendant to testify. That instruction therefore did not violate the principles of *Griffin*.

Consistent with this guiding premise, the Court has applied the rule in *Griffin* only where, as in *Griffin* itself, the prosecutor has asked the jury to infer the defendant's guilt from his failure to testify. See, e.g., *Fontaine v. California*, 390 U.S. 593 (1968); *Anderson v. Nelson*, 390 U.S. 523 (1968); *Chapman v. California*, 386 U.S. 18 (1967). The

prosecutor in the present case made no such request of the jury. Indeed, the prosecutor did not comment on respondent's *failure* to testify; he commented on his *freedom* to testify, pointing out, in response to defense argument, that the government had not prevented respondent from telling his side of the story. That is simply not the kind of comment proscribed by *Griffin*.

2. Although we believe that the court of appeals' broad construction of the rule in *Griffin v. California* is wrong, it is not unprecedented. Several courts of appeals have interpreted the *Griffin* rule to limit prosecutors' summations with restrictive rules that go far beyond the restriction imposed in *Griffin* itself. In its most common form, this erroneous interpretation of *Griffin* has led some courts to adopt a rule forbidding a prosecutor even from characterizing the evidence at trial as "uncontradicted" or "unrefuted." The First Circuit, purportedly under the authority of *Griffin*, has flatly prohibited prosecutors from describing the government's proof in these terms. See, e.g., *United States v. Skandier*, 758 F.2d 43, 44 (1985) ("[f]or twenty years we have held it reversible error to state baldly that the government's evidence was uncontradicted"); *United States v. Cox*, 752 F.2d 741, 745 (1985); *Desmond v. United States*, 345 F.2d 225, 227 (1965). The Seventh Circuit has imposed the same restriction, at least in cases in which the defendant may be the only witness who could have "contradicted" the government's proof. See, e.g., *United States ex rel. Burke v. Greer*, 756 F.2d 1295, 1300-1301 (1985); *United States v. Wilkins*, 659 F.2d 769, 774, cert. denied, 454 U.S. 1102 (1981); *United States v. Poole*, 379 F.2d 645, 649 (1967) (error to describe evidence as "uncon-

tradicted" even where a witness other than the defendant could have contradicted it). Several other courts have imposed similar restrictions, again relying on *Griffin*. See, e.g., *Raper v. Mintzes*, 706 F.2d 161, 164-167 (6th Cir. 1983); *Runnels v. Hess*, 653 F.2d 1359, 1361-1362 (10th Cir. 1981); *United States v. Sanders*, 547 F.2d 1037, 1042-1043 (8th Cir. 1976), cert. denied, 431 U.S. 956 (1977). Some state courts have likewise read *Griffin* to preclude prosecutors from characterizing the government's proof as "uncontradicted." See, e.g., *Todd v. State*, 598 S.W.2d 286, 294 (Tex. Crim. App. 1980); *State v. Messinger*, 8 Wash. App. 829, 840, 509 P.2d 382, 390 (1973), cert. denied, 415 U.S. 926 (1974); *Ross v. State*, 268 Ind. 471, 474, 376 N.E.2d 1117, 1118 (1978), cert. denied, 439 U.S. 1080 (1979); but see *People v. Ganter*, 56 Ill. App. 3d 316, 326, 371 N.E.2d 1072, 1079 (1977).

We believe that the expansive reading of *Griffin* to prohibit a prosecutor from characterizing evidence as "uncontradicted," like the court of appeals' ruling in this case, reflects a misunderstanding of the intended scope of *Griffin*. While the rule in *Griffin* was designed to reduce the pressures on a defendant to testify, the rule cannot fairly be read to shield the defendant from all the consequences of his failure to take the stand. The government, which bears the burden of proof beyond a reasonable doubt, should not be prohibited from describing its proof at trial as uncontradicted simply because the absence of contradiction results in part from the defendant's failure to testify. Otherwise, as Justice Stevens observed in *United States v. Hastings*, 461 U.S. 499, 515 (1983) (Stevens, J., concurring in judgment), "the protective shield of the Fifth Amendment

[w]ould be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." See also *United States v. Rodriguez*, 556 F.2d 638, 642 (2d Cir. 1977), cert. denied, 434 U.S. 1062 (1978).

The same rationale applies to this case. The *Griffin* rule prohibits only the suggestion that the defendant is probably guilty because he did not take the stand. It does not prohibit the prosecutor from pointing out that the weight of the evidence—or even *all* the evidence—favors the government's theory of the case. And it surely does not prohibit the government from defending itself against the charge that the government has distorted the truth-finding process by preventing the defendant from presenting his side of the story. In short, the court of appeals gave the rule in *Griffin* an expansive reading that the rationale of that case does not justify.

B. The Court Of Appeals Overlooked The Context In Which The Rebuttal Comments Were Made

The court of appeals ignored a second, related limitation on the rule in *Griffin*: whether a prosecutor's remarks are proscribed by *Griffin* depends on the context in which the remarks are made. In *Lockett v. Ohio*, 438 U.S. 586, 594-595 (1978), for example, the defendant contended that the prosecutor violated *Griffin* when he characterized the government's evidence as "unrefuted" and "uncontradicted." This Court rejected the *Griffin* claim. The Court noted that, unlike in *Griffin*, it was defense counsel who had first focused the jury's attention on defendant's failure to testify. The Court held that in that context the prosecutor's argument did not constitute a violation of the principles of *Griffin*.

The decision in *Lockett* reflects the basic proposition—overlooked by the court of appeals in this case—that the rules that constrain the government in its direct case do not necessarily apply to matters of rebuttal and impeachment. If the law were otherwise, the Court has held, "the shield provided by [constitutional decisions could] be perverted into a license to use perjury by way of a defense" (*Harris v. New York*, 401 U.S. 222, 226 (1971)). "[U]nless prosecutors are allowed wide leeway in the scope of impeachment * * *[,] some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Doyle v. Ohio*, 426 U.S. 610, 617 n.7 (1976).¹¹ The jury can properly discharge its function of "evaluating the truth of [a defendant's] testimony" (*Tennessee v. Street*, 471 U.S. 409, 415 (1985)) only if the government is allowed the freedom to respond to defense arguments that would otherwise be misleading. That freedom necessarily extends to arguments that would be improper if they were made not in response to a defense argument, but as part of the government's opening summation.

The Court applied this principle, in a closely analogous setting, in *Raffel v. United States*, 271 U.S. 494 (1926). The defendant in that case was tried twice. At the first trial, a government agent testified that the defendant had made an inculpatory statement. The defendant did not testify. After the first trial ended in deadlock, the defendant was retried

¹¹ "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States v. Nixon*, 418 U.S. 683, 709 (1974).

and this time elected to testify. On cross-examination, the prosecutor elicited the fact that the defendant had not testified at the first trial. Although it was by then firmly established that in the federal system a prosecutor may not comment upon a defendant's failure to take the stand (18 U.S.C. 3481; *Wilson v. United States*, 149 U.S. 60 (1893)), the Court held that the inquiry into the defendant's prior silence did not violate his Fifth Amendment rights. The Court stated that when a defendant takes the stand, "he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined" (271 U.S. at 497). Because the Court concluded that the defendant's silence at the first trial might reflect on the credibility of his testimony at the second trial (271 U.S. at 498), the Court permitted the inquiry.¹²

The Court has applied this principle in a variety of settings, repeatedly holding that a prosecutor enjoys greater leeway in impeachment and rebuttal than in his case-in-chief.¹³ That principle applies

¹² The Court reaffirmed the *Raffel* decision in *Jenkins v. Anderson*, 447 U.S. 231 (1980). In *Jenkins* the Court held that a defendant may be impeached at trial with his failure to tell his exculpatory story prior to his arrest. Earlier, in *Grunewald v. United States*, 353 U.S. 391 (1957); *Stewart v. United States*, 366 U.S. 1 (1961); and *United States v. Hale*, 422 U.S. 171 (1975), the Court distinguished *Raffel* on the ground that the defendant's prior silence in the context of those cases was not in any way indicative of his lack of credibility as a witness.

¹³ See, e.g., *Harris v. New York*, 401 U.S. 222 (1971) (government may impeach a testifying defendant with confessions taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Jenkins v. Anderson*, 447 U.S. 231 (1980) (government may impeach a testifying defendant with his failure to

with equal force to rebuttal summations. A prosecutor's summation "must be evaluated in light of the defense argument that precede[s] it" (*Darden v. Wainwright*, No. 85-5319 (June 23, 1986), slip op. 10). If the court concludes that the prosecutor's remarks were "invited," and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction" (*United States v. Young*, 470 U.S. 1, 12-13 (1985) (footnote omitted)).

This Court has recognized the need to review a prosecutor's argument in light of the preceding defense argument, both for purposes of determining whether the prosecutor's argument was error at all, and for purposes of determining whether the error requires reversal. In *Lawn v. United States*, 355 U.S. 339 (1958), for example, the prosecutor commented in his rebuttal summation that the government believed that the two principal government witnesses were telling the truth. The Court concluded that that argument was proper in light of defense counsel's closing argument, in which counsel had argued that the government was persecuting the de-

tell his exculpatory story prior to his arrest); *Doyle v. Ohio*, 426 U.S. 610, 619-620 n.11 (1976) (government may impeach a defendant with his failure to tell his exculpatory story after receiving *Miranda* warnings if defendant testifies that he did tell that story to the police after his arrest); *Walder v. United States*, 347 U.S. 62 (1954) (illegally seized evidence may be used as impeachment material); *Tennessee v. Street*, 471 U.S. 409 (1985) (government may offer into evidence a co-defendant's confession, otherwise inadmissible under *Bruton v. United States*, 391 U.S. 123 (1968), to correct a potentially misleading impression created by the defendant's testimony). See generally *Doyle v. Ohio*, 426 U.S. at 628-629 & n.8 (Stevens, J., dissenting).

fendants and that the prosecution was instituted in bad faith, solely at the instance of the investigating agents. 355 U.S. at 359-360 n.15.

Even where the Court has found the prosecutor's argument improper, it has assessed the question whether the error is reversible in light of the context of the remarks, and in particular in light of the defense argument to which the prosecutor was responding. In *Darden v. Wainwright*, for example, the prosecutor implied that only the death penalty could keep the defendant from killing again. The prosecutor also referred to the accused as an "animal" and made several arguments that played on the emotions of the jury. Although the Court regarded these remarks as "offensive" (slip op. 11) and "deserv[ing] [of] condemnation" (*id.* at 10), it held that the remarks did not deprive the defendant of due process. "Much of the objectionable content," the Court observed (*id.* at 13), "was invited by or was responsive to the opening summation of the defense."

Similarly, in rejecting a challenge to the prosecutor's rebuttal remarks in *Young*, the Court concluded (470 U.S. at 17-18) that the impact of the rebuttal "was mitigated by the jury's understanding that the prosecutor was countering defense counsel's repeated attacks on the prosecutor's integrity and defense counsel's argument that the evidence established no * * * crime." The Court made it clear (*id.* at 18) that a prosecutor's rebuttal summation must be considered in the context of "defense counsel's broadside attack." In this light, the Court held, the rebuttal did not cause the jury to "stray from its responsibility to be fair and unbiased" (*ibid.* (footnote omitted)).

Viewed in context, the prosecutor's summation in the present case did not constitute an unfair com-

ment on respondent's failure to testify. By accusing the government, in effect, of having refused to give respondent an opportunity to tell his story—either before trial or at the trial itself—defense counsel invited the prosecutor's response. The response, moreover, was brief and narrowly tailored to the invitation. The jury, having heard defense counsel's lengthy jeremiad against the government's tactics, could only have understood the rebuttal in the way it was intended: as a denial that the government had deprived respondent of his chance to tell his side of the story. The court of appeals overlooked the special function of rebuttal and, for that reason, found error where there was none.

C. The Rebuttal Comments Did Not Impermissibly Burden Respondent's Exercise Of His Right Not To Testify

The court of appeals' assertion that the prosecutor's rebuttal was an unlawful comment on respondent's silence may also rest upon the unarticulated premise that rebuttal of this sort impermissibly burdens the decision not to testify at trial. If that was the premise of the court's ruling, however, it is difficult to see where the impermissible burden arises. In the first place, it seems speculative and even unlikely as an empirical matter that a defendant will be deterred from exercising his right not to testify by the mere possibility that, should his attorney blame the government for the defendant's silence, the prosecutor will be permitted to refute that charge in rebuttal. A defendant has little to fear from a rule that permits comment of this sort, since it takes effect only when defense counsel forces the prosecutor's hand.

But even if the kind of rebuttal given in this case could place some burden on the defendant's exercise

of his right not to testify, it does not follow that such a burden would be impermissible. This Court has made it clear that the mere fact that a particular rule "has a discouraging effect on the defendant's assertion of his trial rights" does not make that rule unconstitutional (*Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)). Whether a particular burden is excessive "depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect." *Garrity v. New Jersey*, 385 U.S. 493, 507 (1967) (Harlan, J., dissenting).

For example, in *Jenkins v. Anderson*, 447 U.S. 231 (1980), the Court held that a prosecutor did not unfairly burden a defendant's right to remain silent when he cross-examined the defendant about his failure to tell his exculpatory story prior to his arrest. The Court stressed (447 U.S. at 236 (quoting *Chaffin v. Stynchcombe*, 412 U.S. at 30)) that "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" The Court stated (447 U.S. at 238), moreover, that "[i]n determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice." On that issue, the Court concluded (*ibid.*), the practice of affording prosecutors wide latitude to impeach defendants "may enhance the reliability of the criminal process" by "allow[ing] prosecutors to test the credibility of witnesses." The Court acknowledged (*ibid.*) that, as a result of this rule, a defendant "may decide not to take the witness stand." But

"this is a choice of litigation tactics"—not an impermissible burden on a constitutional right.¹⁴

In the framework established by these cases, an argument such as the prosecutor's rebuttal argument in this case cannot be said impermissibly to burden a defendant's decision whether to testify. A defendant who contemplates testifying in his own behalf is faced with many analogous—indeed, considerably more burdensome—disadvantages. Once he takes the stand, he cannot claim his Fifth Amendment privilege to avoid cross-examination on matters reasonably related to the subject matter of his direct examination (see, e.g., *Brown v. United States*, 356 U.S. 148 (1958); *Johnson v. United States*, 318 U.S. 189, 195 (1943); *Fitzpatrick v. United States*, 178 U.S. 304, 314-316 (1900)). A testifying-defendant may also be impeached by proof of prior convictions (see, e.g., *Marshall v. Lonberger*, 459 U.S. 422 (1983); *Spencer v. Texas*, 385 U.S. 554 (1967); Fed. R. Evid. 609), prior inconsistent statements taken in violation of *Miranda* (*Harris v. New York*, *supra*), prior similar acts or instances of conduct relevant to credibility (Fed. R. Evid. 404(b),

¹⁴ Accord, e.g., *Corbitt v. New Jersey*, 439 U.S. 212 (1978) (upholding rule mandating life term on conviction by jury while permitting life term or less on conviction by plea, despite claim that this burdens right to trial by jury); *McGautha v. California*, 402 U.S. 183 (1971) (upholding rule combining trial and sentencing proceedings, despite claim that this compels a defendant to testify in order to influence the sentence that he receives); *Williams v. Florida*, 399 U.S. 78 (1970) (upholding statute that required a defendant to provide the prosecution with the names of alibi witnesses before trial or lose the right to present an alibi defense; rejecting claim that the statute unfairly burdens the privilege against compulsory self-incrimination).

608(b)), and general evidence of bias (see *United States v. Abel*, 469 U.S. 45, 50-51 (1984)). And if the defendant's motion for acquittal at the close of the government's evidence is denied, he risks bolstering the government's case sufficiently to support an otherwise unjustifiable verdict of guilty if he puts on a defense (see, e.g., *United States v. Calderon*, 348 U.S. 160, 164 (1954)). The fleeting possibility that a prosecutor may refer to the defendant's silence at trial should defense counsel blame the government for that silence cannot "add[] in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not" (*Raffel v. United States*, 271 U.S. at 499).¹⁵

¹⁵ The Court's decisions in *United States v. Hale*, 422 U.S. 171 (1975), and *Doyle v. Ohio*, 426 U.S. 610 (1976), do not support the court of appeals' ruling in this case. In those cases the Court held that prosecutors may not cross-examine defendants about their silence following arrest and the receipt of *Miranda* warnings. The Court determined that persons who "had just been given the *Miranda* warnings" would be "particularly aware of [their] right to remain silent" (*Hale*, 422 U.S. at 177). See also *id.* at 182-183 (White, J., concurring in the judgment); *Doyle*, 426 U.S. at 617-619. "Under these circumstances," the Court concluded, the "failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication" (*Hale*, 422 U.S. at 177). The Court therefore characterized as "insolubly ambiguous" a defendant's silence following the receipt of *Miranda* warnings (*Doyle*, 426 U.S. at 617), and noted that because the warnings implicitly assure the defendant "that silence will carry no penalty, * * * it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial" (*id.* at 618 (footnote omitted)). Thus, as

II. THE "PLAIN ERROR" DOCTRINE APPLIES TO CONSTITUTIONAL ERRORS

After the Court remanded this case with instructions that it be reconsidered in light of *United States v. Young*, 470 U.S. 1 (1985), the court of appeals adhered to its earlier judgment. It distinguished *Young* in part on the ground that the summation in *Young* violated an *ethical* norm, while the summation in this case abridged a *constitutional* principle (Pet. App. 5a-6a).¹⁶ That distinction has no basis in the

the Court has since confirmed, *Hale* and *Doyle* turned on the fact that "the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." *Fletcher v. Weir*, 455 U.S. 603, 606 (1982) (per curiam). *Hale* and *Doyle* do not suggest that the same rule would apply if the defendant were told that his silence at the time of arrest could be used against him at trial. Those cases therefore cannot be read as exceptions to the basic proposition that rules of criminal procedure are not unconstitutional simply because they impose some burden on the exercise of a defendant's constitutional rights.

¹⁶ The court of appeals also distinguished *Young* on the ground that in that case the prosecutor had invoked his own credibility whereas here the prosecutor had somehow impugned the respondent's credibility (Pet. App. 8a). There is no basis for this distinction. Nothing in the prosecutor's summation in this case adverted, even obliquely, to respondent's credibility. The court of appeals also held (*ibid.*) that the evidence in this case was not as overwhelming as in *Young*, a conclusion that the court derived from the jury's failure to convict respondent on all charges. Apart from its failure to acknowledge the extraordinary strength of the government's evidence, the court of appeals plainly misread the *Young* case. In *Young*, as in this case, the jury acquitted the defendant of one of the charges, a fact that this Court regarded as "reinforc[ing] our conclusion that the prosecutor's remarks did not undermine the jury's ability to view the evidence independently and fairly." 470 U.S. at 18 n.15. Other

Young decision and is in conflict with this Court's application of the contemporaneous objection rule.

1. The *Young* case involved a challenge to a prosecutor's rebuttal summation. Prior to the rebuttal, defense counsel had argued that not even the prosecution believed the defendant to be guilty, and that the only person who had behaved with integrity in the case was the defendant. In response, the prosecutor denied counsel's claim that no one sitting at the government table believed the defendant to be guilty. The prosecutor also offered his opinion that defendant's actions constituted a fraud and advised the jurors that, in his opinion, the jurors would not be doing their job if they acquitted the defendant. At no time did defense counsel object. 470 U.S. at 5-6.

Because no objections had been made, the Court held that the rebuttal argument must be reviewed under the "plain error" doctrine embodied in Fed. R. Crim. P. 52(b). That rule, the Court observed, "authorizes the Courts of Appeals to correct only 'particularly egregious errors'" (470 U.S. at 15, quoting *United States v. Frady*, 456 U.S. 152, 163 (1982))—in particular, "those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings'" (*ibid.*, quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

Nowhere in *Young* did this Court intimate that the plain error rule applies differently when constitutional rights are implicated. Indeed, the Court made

circuit courts have made the same point. See, e.g., *United States v. Torres*, 803 F.2d 429, 442-443 (7th Cir. 1987); *United States v. Mandelbaum*, 803 F.2d 42, 46 (1st Cir. 1986); *United States v. Carson*, 702 F.2d 351, 368 (2d Cir.), cert. denied, 462 U.S. 1108 (1983); *United States v. Matalon*, 445 F.2d 1215, 1219 (2d Cir.), cert. denied, 404 U.S. 853 (1971).

clear that "[a] *per se* approach to plain-error review is flawed" (470 U.S. at 17 n.14) and that, instead, "each case necessarily turns on its own facts" (*id.* at 16, quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 240 (1940)). How an error is labeled—constitutional or otherwise—is beside the point. Rather, to trigger appellate review under Rule 52(b), the Court held, an error "must be more than obvious[,] * * * affect[] 'substantial rights,' * * * [and] ha[ve] an unfair prejudicial impact on the jury's deliberations" (470 U.S. at 17 n.14).

2. Nothing in the language of Fed. R. Crim. P. 52(b) justifies distinguishing between constitutional and non-constitutional errors. Rule 52(b) permits a reviewing court to notice "[p]lain error or defects affecting substantial rights" even though no objection has been made at trial. Depending on the nature of the right and the particular factual setting, constitutional errors may be substantial or insubstantial, just as non-constitutional errors may be.

The legislative history of Rule 52(b) suggests that the draftsmen of the Rule intended it to ensure fundamental fairness in the trial process, regardless of whether the error in question was constitutional in origin. This Court noted in *Young* that "[a] review of the drafting that led to the Rule shows that the Committee sought to enable the Courts of Appeals to review prejudicial errors 'so that any miscarriage of justice may be thwarted.'" 470 U.S. at 15 n.12 (quoting Advisory Committee on Rules of Criminal Procedure to the Supreme Court of the United States, Federal Rules of Criminal Procedure, Preliminary Draft 263 (1943)). There is no evidence that the draftsmen believed that constitutional errors were categorically more likely to promote a "miscarriage of justice." Indeed, the Advisory Committee Note

accompanying Rule 52(b) (18 U.S.C. App. at 657) states that the Rule "is a restatement of existing law" as set forth by the Court in *Wiborg v. United States*, 163 U.S. 632 (1896). Accord *Young*, 470 U.S. at 15 n.12. In *Wiborg*, the Court reversed a conviction for lack of evidence. The Court held that in the absence of sufficient evidence, counsel's failure to request a verdict for the defendant was "a matter so absolutely vital to defendants" (163 U.S. at 658) as to constitute plain error. The importance of the error—and not its constitutional or non-constitutional label—was the decisive factor.

3. The distinction drawn by the court of appeals also mistakes the nature of the plain error rule, which stands as a narrow exception to the more basic principle that to preserve an issue—constitutional or otherwise—a contemporaneous objection must be lodged. The contemporaneous objection rule serves several obvious and important purposes. First and foremost, an objection informs the trial judge—and assures a reviewing court—that the objecting party actually disapproves of some aspect of the proceeding and does not accept or acquiesce in its legality. Unless a party registers an objection, he must be understood to approve what has happened at trial and presumptively to forsake any claim of injury. This Court made that point, in a setting similar to the present case, in *Johnson v. United States*, 318 U.S. 189 (1943). In *Johnson*, the defendant was permitted by the trial judge to refuse on self-incrimination grounds to answer certain questions put to him by the prosecutor during cross-examination. The prosecutor thereafter argued to the jury that the defendant's assertion of his Fifth Amendment privilege should be treated as evidence that the balance of his testimony was false. Foreshadowing its decision in

Griffin, this Court observed (318 U.S. at 196) that because the trial court had permitted the defendant to claim a privilege against testifying, "the requirements of fair trial may preclude any comment."¹⁷ Nevertheless, the Court held (*id.* at 199-201) that the defendant had waived that claim by failing to register an objection at trial. The Court observed (*id.* at 199-200) that although counsel had initially objected to the prosecutor's remarks, he later withdrew that objection and instead made an objection "of a wholly different character" (*id.* at 200). Counsel's decision thus amounted to "silent approval of the course followed by the court * * * accompanied by an express waiver of a prior objection" (*ibid.*). To entertain a claim on appeal, the Court concluded (*id.* at 201), "would not comport with the standards for the administration of criminal justice" in that it would permit the defendant "to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him."

In addition to simply registering a party's disapproval, timely objection affords both the trial court and the prosecutor the opportunity to consider, and perhaps rectify, their decisions and trial tactics while it is still possible to do so. *Henry v. Mississippi*, 379 U.S. 443, 448 (1965); *United States v. Indiviglio*, 352 F.2d 276, 280 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966). Moreover, if a defendant prevails on his objections, he may avert prejudicial error and thus enhance his chances to secure

¹⁷ In support of this proposition the Court cited (318 U.S. at 196) the decision in *Wilson v. United States*, 149 U.S. 60 (1893), a case on which the Court would later rely in reaching its decision in *Griffin* (380 U.S. at 612).

an acquittal from the jury. And if he nonetheless is convicted, his timely objections will have defined the points to be reviewed on appeal and will have obviated the need to reverse a conviction simply because an error that was susceptible of correction was not perceived at trial.¹⁸

Any distinction between constitutional and non-constitutional error would disserve these purposes of the contemporaneous objection rule. Simply because evidence or argument is challenged on constitutional grounds should not relieve counsel of the duty to bring that objection to the immediate attention of the trial court. There is nothing about the label "constitutional" that reduces the importance of "direct[ing] the mind of the trial court to the precise point to afford opportunity for reconsideration" (*United States v. La Franca*, 282 U.S. 568, 570 (1931)). Nor does the fact that an objection can be characterized in constitutional terms diminish the value of framing that issue clearly, both for resolution at the trial level and, if need be, for appellate review.

The present case demonstrates persuasively why the contemporaneous objection rule must be applied with equal rigor to constitutional and non-constitutional errors. In his brief in opposition to certiorari in this case, respondent contended that the trial judge and

¹⁸ As the Court has observed, "[a] contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest [and] * * * [i]t enables the judge who observed the demeanor of the witnesses to make the factual determinations necessary for properly deciding the federal constitutional question. * * * A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation." *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977).

the prosecutor misinterpreted his summation. See Br. in Opp. 1-9. According to respondent, counsel did not accuse the government of denying respondent a chance to explain himself at trial; rather, according to respondent (*id.* at 4), counsel simply claimed that respondent had not been given a chance to refute the fraud charges during the preindictment investigation. Respondent therefore assailed the prosecutor's rebuttal as "utterly gratuitous" and "inherently unresponsive to the context" of the defense summation (*id.* at 6-7). But respondent's failure to make this objection at the time of trial obviously left the trial judge and the prosecutor in the dark. Both the trial court and the prosecutor understood the defense summation as an assertion that respondent had been denied a chance to tell his story, both prior to trial and at the trial itself.¹⁹ The prosecutor expressed that view when he requested permission, during the bench conference following the defense summation, to respond to defense counsel's argument. Yet defense counsel did not object to the prosecutor's proposed rebuttal, nor did he suggest that the prosecutor had misunderstood his argument on that point. If defense counsel had intended to convey a different message during his argument, he had a duty to make that message clear at the time the prosecutor requested the court's permission to respond as he did and the court granted that permission.²⁰

¹⁹ That interpretation of defense counsel's argument was certainly a reasonable one, in light of defense counsel's argument to the jury that respondent had been denied the opportunity to "explain before you, members of your own community, rather than before the agents" (Tr. 671; J.A. 19).

²⁰ As in the *Johnson* case, counsel's failure to object cannot be dismissed as mere "inadvertence or oversight" (*Johnson*,

Defense counsel had a second opportunity to object to the prosecutor's rebuttal, at the time the prosecutor actually made his rebuttal argument to the jury. Even at that point, if defense counsel had objected and the court had agreed that the argument was improper, the court could have given a strong curative instruction that in all likelihood would have eliminated any risk of prejudice stemming from the prosecutor's comment. Again, however, defense counsel made no objection, thus denying the court the opportunity to cure on the spot what respondent later insisted was grave constitutional error.

4. The court of appeals' distinction between constitutional and non-constitutional errors also cannot be squared with this Court's application of the contemporaneous objection rule and the plain error exception to that rule. The Court has applied the plain error rule chiefly in order to review errors that threatened the reliability of a verdict or a sentence—regardless of whether a constitutional right was at stake. In some of its early cases the Court applied the plain error doctrine to ensure that defendants

318 U.S. at 200). At the close of defense counsel's summation, the prosecutor moved to make two distinct arguments in rebuttal: first, that the government had not kept respondent from testifying; and second, that the government had attempted at trial to offer certain evidence whose absence from the case defense counsel had assailed in his summation. Defense counsel objected only to the second proposed argument, and the trial judge sustained the objection. Conspicuously, counsel made no objection to the prosecutor's request that he be allowed to rebut the contention that the government had kept respondent from telling his side of the story. Counsel's failure to object can only be understood as a "recognition that the action of the trial judge was unexceptionable" (*id.* at 203 (Frankfurter, J., concurring)). See also *Benson v. United States*, 146 U.S. 325, 331-333 (1892).

were not convicted on insufficient evidence. See, *e.g.*, *Clyatt v. United States*, 197 U.S. 207 (1905); *Wiborg v. United States*, 163 U.S. 632 (1896). See also *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (per curiam). The Court has also found plain error in other settings involving non-constitutional claims. Thus, the Court has found plain error where a verdict or sentence was suspect because of a prejudicial summation (*N.Y. Central R.R. v. Johnson*, 279 U.S. 310 (1929)), where the trial judge made improper remarks to the jury (*Rogers v. United States*, 422 U.S. 35 (1975); *Brasfield v. United States*, 272 U.S. 448 (1926)), where the court failed to charge an element of the offense (*Screws v. United States*, 325 U.S. 91 (1945) (plurality opinion)), where a biased juror participated in the deliberations (*Crawford v. United States*, 212 U.S. 183 (1909)), and where the court increased the sentence in the defendant's absence (*Bartone v. United States*, 375 U.S. 52 (1963)). In none of these cases did the Court suggest that the constitutional or non-constitutional nature of the error was relevant to its plain error analysis.²¹

²¹ Although there is language in *Weems v. United States*, 217 U.S. 349 (1910), suggesting that plain error may more readily be noticed for constitutional claims (217 U.S. at 362), that case cannot be read to justify a categorically different treatment for constitutional errors. The defendant in *Weems*, having been convicted in the Philippines of making false entries in a ledger, was sentenced to 15 years of hard labor, to be served while shackled from wrist to ankle, and thereafter to a lifetime under government surveillance and without the right to marry, to be a parent, or to own property. Finding (*id.* at 366) that "[n]o circumstance of degradation [was] omitted" from this punishment, this Court held that the defendant could raise a claim of cruel and unusual punishment without having made such an objection below. Obviously, the sentence imposed in *Weems* "seriously affect[ed] the fairness,

By contrast, the Court has stated that "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before the tribunal having jurisdiction to determine it" (*Yakus v. United States*, 321 U.S. 414, 444 (1944)). Accord *Jennings v. Illinois*, 342 U.S. 104, 108-109 (1951). Thus, the Court has not hesitated to apply the contemporaneous objection rule, despite the fact that a constitutional claim was thereby foreclosed. See, e.g., *Levine v. United States*, 362 U.S. 610, 619 (1960) ("[t]he continuing exclusion of the public in this case is not to be deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom at the final stage of the proceeding, thereby giving notice of the claim now made and affording the judge an opportunity to avoid reliance on it"); *Seguro v. United States*, 275 U.S. 106, 111-112 (1927) (Fourth Amendment challenge to the seizure of evidence waived in the absence of a timely motion to suppress). See also *Kimmelman v. Morrison*, No. 84-1661 (June 26, 1986), slip op. 15-16 n. 7; *On Lee v. United States*, 343 U.S. 747, 749 n.3 (1952).

The court of appeals freed itself from the rigors of the plain error rule in this case because it believed that a constitutional right was at stake. Even if that

integrity or public reputation of judicial proceedings" (*United States v. Atkinson*, 297 U.S. at 160); thus, *Weems* should not be read as authority to depart from that rigorous "plain error" standard in constitutional cases. Moreover, the *Weems* case involved a sentencing decision, not an evidentiary ruling; in that setting, the policies mandating contemporaneous objection are less compelling.

premise were valid—and we submit that it is not—the court misapplied the plain error doctrine to reverse respondent's conviction on an issue that obviously did not trouble respondent at trial.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

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In The
Supreme Court of the United States
October Term, 1986

UNITED STATES OF AMERICA,
Petitioner,
v.

THOMAS O. ROBINSON, JR.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether, after defense counsel has argued in summation that the government prevented the defendant from explaining his side of the story, a prosecutor may respond in rebuttal that the defendant was free to testify had he chosen to do so?

2. Whether the "plain error" doctrine applies to errors affecting constitutional rights?

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STATEMENT

At a jury trial in the United States District Court for the Middle District of Tennessee, respondent was tried on a six-count indictment. Before the close of proof, the district court dismissed two counts charging that respondent made and possessed an unregistered incendiary destructive device consisting of a cooking pot containing gasoline, a fan, and an electric range. The jury acquitted respondent and co-defendant on two counts of making false statements to a bank for purposes of obtaining a loan. The jury returned a verdict of guilty on two counts of mail fraud based on two separate occurrences over a year apart. Prosecution was based on two theories: some items listed in support of the insurance claim were not in fact destroyed by fire, as claimed; and the two fires had been set by respondent and/or Mrs. Robinson, the co-defendant.

The evidence at trial established that since early 1976, the Robinson family had lived in Clarksville, Tennessee. The family retired there from career military service. Tr. 212. The family consisted of Mr. and Mrs. Robinson and their three children.

I. A. The Robinson Truck Stop

In February of 1979, Mr. and Mrs. Robinson mortgaged their home and took a loan to lease and stock a garage. Tr. 287-288, 309, 312. That month, they bought insurance coverage for the garage contents and a wrecker. In May, they leased a restaurant behind the garage. The garage inventory had increased by August, so the insurance on the contents was increased. Tr. 312, 318-319.

1. The Garage Fire—1979

On September 2, 1979, an arson fire in the Robinsons' garage started at about ten p.m., immediately after re-

spondent and his daughter had locked the building. Tr. 555-557. Respondent had been talking to an employee for about ten minutes while his daughter had waited to help lock the garage. Tr. 540-541. After the two locked the garage, respondent walked to the gas pumps and spoke with an employee.¹ In about a minute, there was an explosion and the garage was on fire. Tr. 467-468, 555-557.

2. The Prosecution for Mail Fraud—Arson Theory

A statement given by respondent to investigators was read to the jury. Tr. 438-441. Prosecution evidence implied that the arson was planned by respondent. Tr. 322-323, 376, 442-443, 457-458, 476-484. An investigator testified that accelerant found on the floor had been poured onto the floor (Tr. 442-443), although witnesses for the prosecution established that five, six, or seven cans of gasoline were normally stored inside the garage building (Tr. 366-367) and investigators testified that several cans were found in that area after the fire. Tr. 459, 478, 480.

The government offered the testimony of the employee with whom respondent had been talking when the explosion occurred. Respondent had expressed concern to his employee about insurance recovery for the fire loss. Tr. 466-473.

A witness for the government testified that two weeks prior to the fire, respondent had begun storing his wreck-er in the garage rather than outside. The testimony implied this action was in preparation for arson, although the witness denied knowledge of whether respondent's twenty-four hour mechanic had resigned at that time. Tr. 376.

¹The reports of persons at the scene do not consistently indicate to whom, exactly, the respondent was speaking immediately prior to the explosion. The employee testified to this account. Tr. 467; and see statement of respondent at Tr. 330-339.

The government called a former employee of respondent to report a casual conversation they had had concerning arson fires which had been reported in the vicinity. The fires had been a frequent topic of conversation in the community. The employee reported that respondent had described how a fire could be started by leaving a lighted cigarette in a book of matches which would ignite as the fire burned close to the matches. Tr. 354-356.

The government called a neighbor who recounted a conversation where respondent mentioned his inventory burning. The neighbor denied having known about numerous arson fires in the Guthrie area at that time. The neighbor's reason for finally having reported the statement to the federal investigator was because of gossip at a later fire at the Robinson home. Tr. 489-493.

The government offered testimony of an employee of respondent who had worked for three months prior to the fire. The employee offered his opinion that business had been bad because one large customer had been lost and respondent's efforts to gain another large customer had not been successful. He also reported that there had been a small fire in the garage about two to three weeks prior to the explosive fire, but he was unable to report any details about the small fire. No insurance claims had been made on this small fire. Tr. 359-362.

3. The Prosecution for Mail Fraud—Fraudulent Claim Theory

The government called two witnesses who described respondent's efforts to reconstruct documentation showing ownership of items lost in the fire. One witness had reconstructed documentation from memory in respondent's presence. Tr. 408-433. Earlier, respondent had requested copies of receipts from the witness's company records. The other witness stated that he had prepared documenta-

tion for respondent's use showing respondent's ownership of some equipment though he had not, in fact, sold the equipment to respondent. Tr. 410, 426-433.

Respondent had claimed insurance coverage of fifty thousand dollars on the garage contents and thirty thousand dollars on the wrecker. His inventory in support of these claims showed a loss of one hundred sixty-five thousand dollars. Tr. 341, 344.

A government witness read the transcript of a tape-recorded interview which had been conducted on September 10, 1979, by insurance investigators. In the interview respondent described the fire. Tr. 330-339. *The company never contested the claim, and paid it.* Tr. 345 (emphasis added).

B. The Robinson Home

1. The Preparations to Move—1980

During the course of the summer of 1980, the Robinson family made plans for Mrs. Robinson and their children to live in Berkeley, California, where Mr. Robinson's father could provide them with quarters. Tr. 516-517, 541, 564-565, 579, 581.

The Robinson's planned to drive to California in the family car and in a rented van, transporting household furnishings, clothing, and other such items. Respondent planned to visit in California for a two-week period and then return to Tennessee with their older daughter to sell their home. Tr. 518, 565-566, 593.

2. The Prosecution for Mail Fraud—Arson Theory

Although they were not as candid with neighbors who were acquaintances, the Robinson family told close friends their plans to move to California. Tr. 194, 226, 564-565, 579, 581. Neighbors and others who were not as close to the family assumed from what the Robinsons said that

they were simply leaving to vacation in California for a few weeks. Tr. 183, 178, 136-137, 204. Some neighbors knew they were having financial difficulties because of the fire at the truck stop and a disagreement about whether the respondent was supposed to have insured the building as well as the contents. Tr. 193-194, 589.

A month before the fire, the Robinsons started packing daily. Neighbors and their children helped the Robinsons with the packing during that month. Tr. 226, 252, 566. A few days before they moved, the Robinsons had a yard sale. Tr. 202, 204, 226, 567, 576. At the sale, neighbors saw that there was an unusually large amount of goods and furnishings in the Robinson home. Tr. 179, 198, 566. Neighbors saw that the house was being packed for moving. Tr. 190.

Five days before they moved, respondent rented a moving van. Tr. 163-164, 182, 221. He parked it at their home. Tr. 212-213. They packed it for two or three days before they moved. Neighbors helped them finish packing the van on the night they left. Tr. 252, 227, 256, 298, 568. The government called a mail carrier to show that three days before he left respondent rented a post office box and gave the mailman a change-of-address order routing the mail to the post office box rather than to respondent's home mail box. Tr. 277-278.

A day before they moved, respondent drained the gasoline from his race car (Tr. 232-233) which had sat outside beside the garage for months. Tr. 186, 220. Further, he pushed the race car into the garage on the night they prepared to move in order to protect it from being stolen or tampered with. On many occasions, respondent confided in the presence of one witness that he was afraid for his own personal safety and feared that someone planned to harm him maliciously. Tr. 272-273.

On the night they moved, a great deal of furniture was left stored in the house. Tr. 268. One neighbor said it was an entire household full of furniture. Tr. 566, 579. They finished loading the van at about 1:30 a.m. Tr. 586. Then they packed the car for traveling. Next, respondent and his daughter secured the house, locking doors and windows. Tr. 599.

Respondent was the last person in the house. The family waited in the car and in the van, and he was in the house from five to ten minutes. Tr. 266, 599, 267. He had several aerosol cans of insecticide purchased to fumigate the house immediately before leaving on the trip. Tr. 271, 599. His daughter could see him move through some of the rooms setting off the cans as she stood in their front yard. Tr. 599, 604.

A witness watched the family leave in the car and van; then he went home. The witness's mother testified that he returned home between four and four-thirty in the morning. Tr. 267, 227.

3. The House Fire—1980

Unknown to the Robinsons, on the same evening that they were loading to move there were two arson fires in the vicinity. At midnight, a mobile home was totally destroyed by fire. Investigators later determined one or more arsonists started it with gasoline in the hall of the trailer. The trailer was owned as rental property by the former husband of a close friend of the Robinsons. Tr. 80, 85-86, 94-95, 119, 564. At about three o'clock, the McDougal home burned. Investigators determined the fire was deliberately caused by an accelerant used by one or more arsonists. Tr. 63, 118, 125. Investigators found that at one time, Ms. McDougal had worked for respondent at the truck stop. Tr. 63, 118, 125, 119.

As the Clarksville firemen were preparing to leave the scene of the McDougal fire, they were called to another fire about five to ten minutes away. The roof of the Robinson home was in flames and beginning to sag (Tr. 61, 63, 68-69, 91), when the fire department arrived at about five forty-five a.m. The county fire fighters had been there for a short time. Tr. 50-51, 57, 63, 68.

Investigation revealed it was an arson fire. A cooking pot with gasoline had been set on a stove burner set at high heat. Tr. 100, 59, 65, 70, 72, 91, 101. The pot contained brushes for cleaning or dusting at the time it burned. The pot was later identified as the same type of pot respondent had used to drain fuel from his race car. An investigator observed that it is uncommon for three arson fires to occur within a three-to-four hour time span in the same vicinity in Clarksville. Tr. 77, 233, 96.

The possibility that someone broke and entered the Robinson home could not be conclusively eliminated. Some of the windows and all of the doors were found to be locked. The testimony does not show that all windows were examined for possible illegal entry. None of the windows tried by the firemen were found to be broken or unlocked, but the fire chief stated that windows usually break in a fire as severe as the Robinson house fire. Tr. 52, 55, 57-58, 61, 65.

While the similarity of the use of accelerants in all three arson fires was noted, investigators decided that the other two arson fires were connected, but they eliminated any connection between those fires and the arson fire at respondent's house. The stated basis for this opinion was that they suspected that the two other fires may have been drug-related. Respondent was eliminated as a suspect because he had no record associating him with crime and because witnesses knew where he was at the time of

the other fires. Investigators conceded that the victims of the other two arson fires were in one way or another associated with the defendants in business or as friends. Tr. 94, 118, 97, 121-122, 125-126, 119.

4. The Prosecution for Mail Fraud—Fraudulent Claim Theory

The Robinsons learned about the house fire en route to California, when they telephoned family in California to report their delay caused by mechanical difficulties in the rented van. Tr. 519-520, 553, 600. By phone, respondent learned that his insurance company would need a list of the contents of the home. Tr. 136. A tentative list of all contents of the home was composed. As the van was unloaded items were struck from the list. The list went through several drafts. At trial, the possibility of error was freely admitted. Tr. 521-522, 544, 558-559.

This list was a starting point for compiling the inventory of items lost in support of a claim for thirty thousand dollars for the insured contents of the home. The inventory showed a loss of one hundred thousand dollars to support their proof of loss claim. Tr. 522, 149, 560, Ex. 17, 18.

The inventory list and proof of loss claim were introduced by the government. On the list was written: "This is the first list and subject to revision." Ex. 16, Tr. 137-138, 172; Ex. 18 and 19, Tr. 172. Establishing that some items on the inventory list were found in the California home after the house fire, the government introduced thirty-six photographs of property in respondent's home in California after the house fire (Tr. 117, Ex. 19); testimony of neighbors tending to identify some of the items photographed as having been moved from the Robinson home to California prior to the fire (Tr. 177-178, 184-185, 187-188, 192-193, 203, 215-219, 234-243, 260-266); testimony concerning furnishings offered for sale at the yard

sale (Tr. 190-191, 202-203); and testimony concerning property which was found in the debris of the fire. Tr. 105-110, 117. The defense offered testimony of additional property found in the debris of the fire (Tr. 569-575), the large amount of furniture ordinarily seen in the Robinson house prior to the fire (Tr. 179, 198), and the great deal of furniture left stored in the house on the night of the fire. Tr. 268, 566, 579.

The government played to the jury a tape-recorded interview with respondent, relating to the two fires, conducted by three investigators. Each juror was provided with a transcript of the hour-long recording. Defendant had agreed to the interview. Tr. 167-170.

II. A. The Prosecutor's Summation of the Evidence for the Jurors

Addressing the 1979 garage fire first, the prosecutor argued that respondent left the garage together with his daughter and, inconsistently, that respondent was the last person in the garage; that accelerants were found in the garage office (Tr. 619); that debris of the fire did not reveal contents later claimed, that prior to the fire items were removed from the garage (Tr. 620), that ordinary tools found in the California home had been secreted from the garage (Tr. 621-622), that proof of ownership documents were fraudulently obtained (Tr. 622, 623), that items claimed from the garage fire had been secreted and stored at respondent's home and storage shed (Tr. 624-625), that the wrecker was moved into the garage to collect the insurance, that the race car was removed from the garage to avoid collecting insurance from another insurance company, and that the defendant had wanted to get out of the garage business. Tr. 625. The prosecutor implied that respondent's casual statement to his neighbor that his inventory of tires might burn, coupled with his casual de-

scription of how arson could be committed, indicated that the garage fire was started by respondent. Tr. 627-628.

Turning to the fire at respondent's home, the prosecutor argued to the jury that having financial problems, having the yard sale, packing for a month, using a large moving van, locking the house before leaving, draining fuel into a cooking pot that looked like a cooking pot used in the arson, being the last person in the house, all demonstrated that respondent schemed to burn the house and collect the insurance. Tr. 629-633.

The prosecutor argued that in furtherance of the scheme to defraud the insurance company, respondent called the insurance company upon learning of the fire, immediately began the listing of property required by the agent, and later reviewed the list with the other family members. Tr. 633-634. The prosecutor argued that because there were some misstatements on the inventory of property submitted with their claim for insurance coverage, there was a fraudulent intention to claim property which had not burned. Tr. 634-635. He argued that a significant factor showing the fraudulent scheme was the fact that a loss of one hundred and six thousand dollars was shown on the inventory list to support the smaller claim of thirty thousand dollars under the policy. Tr. 635-636.

B. The Defense Counsel's Summation of the Evidence

Both defense attorneys argued. The loan fraud charge was addressed first. By analyzing the details of the bank agent's testimony, counsel demonstrated that the bank had not relied on the representations appearing in the language of the papers executed by respondent to obtain his loan. Tr. 638-643.

Counsel detailed flaws in the government's proof. Severe debt was not a motive for arson in the garage

fire because the debts arose after the fire. Tr. 643-644. Respondent did not burn the garage to get out of business because he operated the restaurant for another eight months. Tr. 644. The testimony suggesting false claims because of respondent's efforts to document ownership was not reliable. Tr. 645. Batteries were not secreted because the lead within the burned batteries was later salvaged. Tr. 646. Neither parking the wrecker in the garage beginning two weeks prior to the fire (Tr. 646-647), nor discussing arson in a casual conversation (Tr. 647-648), nor renting a post office box for a year show preparation for arson. Tr. 649. The Robinsons did not remove substantially all their furnishings in one van, because the proof showed they had filled their house with an unusually large amount of furniture; the large cooking pot was not seen on the premises by a witness who had been centrally involved in loading the van and rearranging the remaining furnishings on the eve of the fire (Tr. 650-651); the race car was pushed into the garage to prevent vandalism while respondent was away and not to prepare for arson (Tr. 651-652); no witness could testify with certain knowledge whether one of the windows was broken prior to the fire (Tr. 652-653); the prosecutor never specified the items allegedly falsified but instead implied that all items removed from the home were fraudulently listed on the inventory; pictures and evidence of the fire debris show that only one refrigerator was destroyed in the fire; only one refrigerator was listed on the inventory, and the proof showed respondent owned more than one refrigerator. Tr. 653-655. Counsel countered the government's evidence that a microwave oven was in California after the fire by showing that respondent never listed a microwave oven on the inventory list submitted with their claim. Tr. 655.

Counsel argued that proof of guilt had not been established. Further, the government had not played straight with the jurors in the case. J.A. 11.

Counsel referred to proof accusing respondent of obtaining a loan falsely. He compared the itemized list of property leased to the respondent in the lease in evidence with the list of items purportedly owned by respondent in the bank loan documents. The bank list was copied verbatim from the lease by the bank. The bank used the lease to prepare the loan documents. The bank knew respondent only leased the property, proving that the bank did not issue the loan on a material misrepresentation. The jurors themselves could compare the exhibits. J.A. 12-13.

Counsel stressed that the defendant's state of mind was on trial and that guilty intent is the key element of the crimes charged. J.A. 12-13. Examining the testimony offered to prove mail fraud in the garage fire, counsel argued the government had not met its duty to establish guilty intent. Referring to the casual conversation where respondent described how to start a fire with a lighted cigarette and matches, counsel explained standard investigation procedures of interviewing and writing reports. Thus, the investigator wrote the casual statement reported in a field interview with respondent's former employee. Later, the employee was called to testify to what she told the agent, with no further evaluation of her testimony to the context of the statement or weigh its probative value. Counsel summarized his point in saying, "And they have got to prove their cases" (J.A. 16). Referring the jury to the innocent context of respondent's reported statement brought out in cross examination, counsel submitted that this context should have been brought out by the United States Attorney. J.A. 14-16. Unfairness was counsel's

point. Testimony to an innocent conversational statement was an example.

Using another example, counsel submitted that the investigator interviewing neighbors for several blocks wrote a report about the casual conversation in which respondent stated that his inventory might burn during the rash of arson fires in the community. Counsel argued (J.A. 16):

At the same time, there are all these fires going on up there. What would be more natural than saying, 'Well, I could'—how could that be so sinister? 'I could have a fire and everything burn down.'

Counsel demonstrated his theme of unfairness. He argued the government had the resources and investigative power to avoid offering such testimony as the proof, "without putting on more evidence." J.A. 17.

Turning to other examples, counsel said, "How else has the Government been unfair?" J.A. 17. Counsel then listed a series of examples showing the government had been unfair. The prosecutor argued that a microwave oven had been fraudulently claimed when no microwave oven was listed on the inventory list. The prosecutor argued that respondent had pushed the race car into the garage to collect insurance on the car, when their claim was not based on the loss of the car. Counsel asked, "How else has the government been unfair?" J.A. 17.

Defense counsel's next example was the proof offered to show tractor-trailers were parked close to the garage to claim them after the arson, although respondent did not own them and no proof of claim or ownership was offered. Finally, counsel referred to proof that respondent was in the presence of other witnesses at the time of the fire, urging that "no jury in the world would convict Mr. Robinson for arson in Guthrie, Kentucky" (J.A. 17).

Counsel demonstrated the unfairness in prosecuting an indictment charging intentional material misrepresentation on a claim for thirty thousand dollars when the inventory showed a loss of one hundred and six thousand dollars with a comparatively small amount of property incorrectly listed. The inventory submitted bore on its face the words, "This is the first list and subject to revision." Counsel argued the listed inventory was unfairly used; clearly, the mistakes were not material misrepresentation. He said (J.A. 18):

The point is: Was it material? So what if it was a grandfather clock misstated out of that inventory. Would you like to be convicted of a felony and found guilty in this Court when your house burned down and you were 2,000 miles away, when you sent a grandfather clock and didn't have one? Would that be fair? What would be your intent? So was it material, all these things? What they have done in this list, and here is where it is important, where the Government is not trying to be fair.

Referring to the statements and tape-recorded interviews the jurors had heard offered in evidence, counsel submitted there were no questions about the list. He argued (J.A. 18):

By the way, all those statements, I don't know how many statements we heard of Mr. Robinson, they were all about the arson. Did they ever give him a chance to explain about these sorts of things, about mail fraud? Did they ever give this man an opportunity in their many, many statements they took at the time to say, 'Well, I had two bedroom sets.'

The prosecutor did not object nor did the court interrupt with corrective measures. Counsel submitted that the investigators did not ask about the items listed in support of the claim. Interview questions centered on arson, leading respondent to believe that he was suspected of arson, but not offering him any questions about the inventory.

Referring to a witness's description of property seen in the debris, defense counsel said (J.A. 19):

The furniture and clothing, all that clothing out on the lawn, testified to by Mrs. Baxter, "What about your clothing?" They never gave him a chance to explain.

The prosecutor did not object. The Court did not interrupt the argument.

Referring to the photographs of the apartment in California, defense counsel criticized the government for failing to match the photographs with a specific list of items alleged to be intentionally fraudulent. He reemphasized his theme that the element of intentional fraud must be established to prove the crime of mail fraud and the government had not offered evidence which was proof of intentional fraud. Counsel repeated the fact that the inventory list used to prosecute respondent was a first draft and showed a one hundred thousand dollar loss to support a thirty thousand dollar claim. J.A. 19.

Counsel stressed the unfairness of not giving the respondent an opportunity to explain to the investigators first, rather than requiring him to explain it before a jury. Counsel argued (J.A. 19):

It is the first draft, says on that cover letter, Exhibit 36, it is subject to revision. Now, would you like to get indicted for that, without the Government being fair, and being able to explain have him explain before you, members of your own community, rather than before the agents?

The prosecutor did not object; the Court did not interrupt.

Turning to the garage fire, defense counsel stated the defense was based on the fact that the insurance company did not contest the claim but paid it. Defense argued that the claim was based on a loss of twenty-one thousand dollars more than the amount claimed. The investigators had

not asked respondent about the items listed. Out of many pages of listed loss, the Government selected only the few items which appeared suspicious and presented that as proof of intentional fraud. J.A. 21.

Referring to the other arson fires occurring on the night of the house fire, counsel indicated he was unable to sort through and summarize the scattered testimony showing that the victims of the fires were associated in business and socially. He criticized the government's failure to find and offer more information concerning the threats Mr. Robinson received and reported to the investigators. At this point, the prosecutor objected to the statement and the trial court sustained the objection. J.A. 22.

Arguing that the proof offered was based on fragmented suggestions filtered through the interviewing and reporting system of the investigators without evaluating the fragments before prosecuting, without questioning the respondent, and without evaluating the case before instituting formal prosecution, counsel said (J.A. 22):

The Government has not brought you all the proof that they should to show you guilt and innocence. They brought you the type of proof that they carefully filtered, to try to infer circumstantially the guilt of Mr. Robinson.

Referring again to the few items the government had selected from the long inventory claimed in the garage fire, counsel suggested that other items on that list should have been proven to show material misrepresentation. The prosecutor objected, requested a bench conference, and the district court issued a curative instruction informing the jury that the government is not responsible for producing every available witness. J.A. 22.

Prefacing his concluding comments on the burden of proof and the right to remain silent without adverse in-

ference of guilt, counsel submitted the "behavior of the government in this case . . ." and the evidence presented, did not prove guilt. J.A. 22.

III A. The Bench Conference Ruling on the Fifth Amendment Violation

The court excused the jury and conferred with counsel prior to rebuttal. The prosecutor noted offensive portions of defense counsel's argument, suggesting the defense argument was improper when arguing that respondent was not given "the right to explain." He contended that defense had thus given the prosecutor permission to comment. J.A. 25.

The court agreed that defense counsel had opened the door to prosecutorial comment. Observing that the Fifth Amendment forbids comment on the silence of the accused at trial, the court weighed the Fifth Amendment question by making an analogy between the trial and a sporting event, where the prosecutor is placed in a boxing match with his hands tied (being bound by the Fifth Amendment), while defense counsel is allowed to punch the prosecutor in the face. J.A. 25.

Considering the constitutional implications, the court ruled that the Fifth Amendment prohibition was not fair in the case at hand. The court gave the prosecutor permission to say respondent had every opportunity to explain to the jurors. The court counted at least four times that defense counsel's argument went beyond the bounds of argument, allowing constitutionally prohibited commentary on the silence of the accused. The court sustained the prosecutor's objection. J.A. 25.

Next, the prosecutor requested the court to reveal to the jury, either through an instruction or through rebuttal argument, that because of defense counsel's objection, the

court had prevented prosecution from offering evidence of other false insurance claims. The prosecutor urged that defense counsel had argued to the jury that prosecution should have offered proof of other claims defendant had collected. J.A. 26.

The court asked for defense counsel's response before ruling. Counsel told the court he had referred in argument to the few items selected by prosecution from the pages of items listed in the inventory in support of the insurance claim from the garage fire. Counsel pointed out the prosecutor's interpretation of defense argument would have implied his client's guilt. The court then agreed, denying prosecutor's request. J.A. 26.

B. The Rebuttal Argument

The prosecutor devoted the first segment of his rebuttal leading up to the exercise of his license to violate the defendant's Fifth Amendment right under the auspices of the court's interpretation of the invited response doctrine. "We represent the United States of America," he said, announcing that his job is to protect the innocent and prosecute the guilty. J.A. 27. To counter the defense argument that the evidence offered had unfairly accused the defendants, he referred to his ethical duty. He intimated that when the court sustained his objection during defense argument, it bore a relationship to the fairness of the evidence the prosecution had offered. The prosecutor implied that the respondent's explanations to investigators had established his guilt and caused him to be indicted. Implying that the defendant had not answered questions fully, the prosecutor told the jury that the defendant explained himself to the investigators "to the extent he wanted to." The United States Attorney

emphatically pointed out to a jury in a federal criminal trial that this accused citizen could have taken the stand and explained anything that he wanted. J.A. 27.

IV A. The Verdict

Proving this Court's wisdom in prohibiting comment on a defendant's silence, the jurors returned a verdict of not guilty to the loan fraud charges which could be readily disproved by the jurors' review of the self-explanatory documents. They returned a verdict of guilty to the charges which could not be explained by a simple review of exhibits.

B. The Appellate Decision

The United States Court of Appeals for the Sixth Circuit in 1983, reversed the verdict against respondent. The United States did not raise any issue suggesting that defense counsel failed to object after the District Court Judge had considered, elaborated, and ruled on the prosecutor's objection to improper defense argument. Pet. App. 15a-27a.

In 1986, the Sixth Circuit Court of Appeals reconsidered the *Robinson* decision in light of this Court's decision in *United States v. Young*, 470 U.S. 1 (1985), following this Court's instructions. See 470 U.S. 1025 (1985). Summarizing the salient legal features and facts of *Young* and contrasting them to those of the case at hand, the appellate court determined that under the standards set out in the *Young* decision and standards set out in other decisions of this Court, the court's prior reversal of the verdict would stand. Pet. App. 1a-27a.

SUMMARY OF ARGUMENT

I. CONSTITUTIONALLY, LEGISLATIVELY AND JUDICIALLY FORBIDDEN COMMENT BY THE PROSECUTOR ON THE DEFENDANT'S CHOICE NOT TO EXPLAIN HIMSELF TO THE JURY UNJUSTIFIABLY PREJUDICED THE JURY DELIBERATIONS WHEN THE DEFENSE COUNSEL DID NOT ASSERT THAT THE GOVERNMENT PREVENTED THE DEFENDANT FROM OFFERING HIS EXPLANATION TO THE JURY

The privilege against self-incrimination is pivotal in seating the burden of proof on the government in criminal prosecutions, distinguishing our criminal justice system as an accusatorial rather than an inquisitorial system of criminal justice. The prohibition against commenting on the exercise of the Fifth Amendment privilege against self-incrimination is embodied in the constitutional privilege itself and is protected by congressional legislation in 18 U.S.C. 3481. Though a violation is termed a *Griffin* violation, the prohibition was established long before the Court decided *Griffin v. California*, 380 U.S. 609 (1985). The privilege is an attempt to provide a trial free from unconstitutional inferences of guilt. While the jury's natural inclination is to draw an inference of guilt when accusation is met with silence rather than denial, the court and prosecutor are prohibited from adding the force of their comments to the defendant's silence. Such comments interfere with the jury's task of arriving at its verdict exclusively on the basis of the evidence presented for their deliberation by remaining unaffected by the defendant's silence and by balancing the prosecution's full burden of proof in weighing the evidence.

However, when violations of this prohibition do occur, the Court only grants appellate relief upon weighing whether the error affected the verdict. Reversal of a conviction may be accomplished through the appellate court's exercise of a supervisory power, but only where the error meets the test of harm.

The trial court and the prosecutor have a duty not to prejudice the jury with improper argument. The court should interrupt and the prosecutor should abstain from prejudicial actions, in order to assure that verdicts are rendered only on the issues made by the pleadings and the evidence. The Court especially assures that failure to fulfill this duty does not impermissibly infringe on specific guarantees of the Bill of Rights.

When defense counsel has created a situation in the jury's presence which allows the prosecutor or the trial court to commit an act, and that act, without defense counsel's conduct, would have caused the jury to be prejudiced against the defendant, then appellate remedy is inappropriate because the jury's perspective of the defendant's presumed innocence is not prejudiced. Thus, any claim of prosecutorial misconduct is weighed by the court in the context of the facts and circumstances of the case to determine the impact which the challenged improper action had on the perceptions of the jurors. The ultimate question is whether the action affected the jury deliberation and injected into the verdict itself factors outside of the lawfully presented evidence.

Respondent's defense rested on the failure of the government to establish every element of the crime charged beyond a reasonable doubt. A defense of honest mistake was asserted, countering the charge of intentional fraud. Defense counsel argued that the investigators' questions which defendant had submitted to, questions heard by the

jury during lengthy portions of the trial, were questions which never alerted the defendant to any need to explain mistakes on the inventory of losses submitted with the claim for insurance returns on property lost by fire. The government's theory of guilt was partially based on the inventory mistakes. Defense counsel submitted in summation that the government's investigation had been unfair because no such questions were posed, so the defendant was not given the opportunity to explain prior to indictment. Examples of misleading testimony and exhibits offered as proof were characterized by the defense counsel as being unfair. Defense counsel never claimed to the jury that the government had prevented the defendant from explaining. The question presented to the Court is hypothetical.

After defense summation, the prosecutor objected and the court sustained, opting to counter the defense argument, which was deemed improper, by giving the prosecutor advance permission to point out to the jury in rebuttal that the defendant could have explained anything he wanted to explain to the jury. The court decided that the Fifth Amendment and the statutory prohibition against such comment was outweighed by the invited response rule.

Questions posed in the jurors' minds by cross-examination, defense witnesses, and the requirement that the government bear the whole burden of proof, were superseded when the prosecutor added the strength of his position to their inclination to wonder why the defendant failed to explain and deny the accusations. The new perspective changed their questions. If it were just an honest mistake, why doesn't he explain it himself? If the arson fires were caused by someone else associated with the defendant and his other associates who were also vic-

tims of arson, why doesn't he tell us what he knows? The comment on the defendant's silence changed the defendant's trial from an accusatory system of criminal justice to an inquisitorial one. The burden of proof was shared by the defendant in the minds of the jurors.

II. THE MEANING AND THE HISTORIC USE OF THE PLAIN ERROR DOCTRINE SHOW THAT ITS APPLICATION TO THIS CASE IS INAPPROPRIATE, THOUGH THE DAMAGE OF THE ERROR RISES TO THE LEVEL OF PLAIN ERROR

The plain error doctrine is defined by the facts and circumstances in which the doctrine is used to remedy error. It is a discretionary power applied to remedy error by overlooking procedural and other technical omissions of courts and counsel to effect justice in matters where error has vitally affected defendants, especially where constitutional rights are asserted, regardless of the culpability of the defendants. The power is used in order to effect justice, maintain judicial integrity and promote public regard for the fairness of the justice system. The doctrine was developed in the era of elaborate technical procedural requirements as a counter to procedural default.

Rule 52(b) of the Fed. R. Crim. P. incorporates the plain error doctrine, although the elaborate procedural system of exceptions was abolished when the rules of procedure were made uniform in 1944. The focus of the Court is on assuring that the trial court acts collaterally upon the occurrence of error during trial, taking curative measures and otherwise ruling on error made known to the court. Errors not made known to the court may not be considered on appellate review. But Rule 52(b) allows appellate review of plain errors which were not brought to the attention of the court. The Court focuses on the

need for error to be detected during the trial to avoid repeated trials while insisting on justice regardless of procedural default.

The plain error rule is called an exception to the collateral objection rule. Rule 51 of the Federal Rules of Criminal Procedure eliminates the need for exceptions and offers a sufficient alternative to exceptions assuring that error and grounds are made known to the trial court in order for the error to be preserved for appeal. The Court has not explicitly construed Rule 51, though the Court refers to a rigid collateral objection rule to which the plain error rule is an exception.

In this case, respondent appealed an error on grounds known to and considered by the trial court. An objection was sustained adverse to respondent. No exception was asked to be noted, because of wide reliance on the abrogation of the necessity of exceptions in 1944. If a plain error issue arises out of the facts and circumstances of this case, then Rule 52(b) is expanded beyond its language to encompass an even narrower construction of Rule 51 than the language of Rule 51 suggests. The plain error doctrine will be defined not by the language of the plain error rule, not by the Court in decisions spanning the century, not by the circumstances of each case under review, but by a narrow reading of another rule of procedure.

The error in this case did affect the jury deliberations by encouraging the jurors in the natural inference of guilt to be drawn when accusation is met with silence rather than denial. This was crucial in this case, where the defense rests on the failure of the prosecution to establish guilt beyond a reasonable doubt on each element of the crime charged.

While the appellate court decision under review nowhere draws a relationship between plain error and constitutional error, a review of the errors remedied by this Court under the plain error doctrine shows that most of them have been constitutional errors, though sometimes the Court has not, at the time of applying the plain error doctrine's remedy, evolved the category of error as constitutional error until decades have passed.

The Court of Appeals for the Sixth Circuit was correct in finding that the error in this case rises to the level of plain error by applying the test announced in *United States v. Young*, 470 U.S. 1 (1985). In the facts and circumstances of this case, the prosecutor's comment on the defendant's failure to explain operated to affect the jury deliberations and to defeat the defendant's valid defense with factors outside of the evidence.

ARGUMENT

I. CONSTITUTIONALLY, LEGISLATIVELY AND JUDICIALLY FORBIDDEN COMMENT BY THE PROSECUTOR ON THE DEFENDANT'S CHOICE NOT TO EXPLAIN HIMSELF TO THE JURY UNJUSTIFIABLY PREJUDICED THE JURY DELIBERATIONS WHEN THE DEFENSE COUNSEL DID NOT ASSERT THAT THE GOVERNMENT PREVENTED THE DEFENDANT FROM OFFERING HIS EXPLANATION TO THE JURY

The Fifth Amendment to the United States Constitution provides protection for the liberty of the individual against the power of the government in criminal prosecutions. It provides that no person may be compelled in any criminal case to be a witness against himself. The privilege is pivotal in the mechanism of criminal justice designed by the common law and articulated definitively by the Constitution. The privilege reflects "our prefer-

ence for an accusatorial rather than an inquisitional system of criminal justice" (*Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964)). The privilege operates to place the burden of proof entirely on the government to establish guilt before depriving any person of liberty.²

To give full effect to this extreme protection of liberty provided by the Constitution, requiring the disproportionate burden of the contest in a criminal trial to be carried by prosecution, both this Court and Congress have specifically delineated the sweep and scope of the privilege. Applied to the case at hand, the Constitution, the legislation,³ and this Court mandate that if respondent chooses not to offer his own testimony to explain and defend himself to the jury, then his failure "to testify in his own defense 'shall not create any presumption against him'" (*Stewart v. United States*, 366 U.S. 1, 2 (1961)); and see *Wilson v. United States*, 149 U.S. 60 (1893); *Raffel v. United States*, 271 U.S. 494, 496-499 (1926); *Johnson v. United States*, 318 U.S. 189, 196 (1943); *Grunewald v. United States*, 353 U.S. 391, 425-426 (1957) (Black, J. concurring); *Griffin v. California*, 380 U.S. 609, 614 (1965); *Chapman v. California*, 386 U.S. 18, 26 (1967); *Doyle v. Ohio*, 426 U.S. 610, 618 (1976); *Jenkins v. Anderson*, 447 U.S. 231, 235 (1980)).

²The Court in *Murphy* says this privilege reflects our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" (*Id.* at 55).

³62 Stat. 833, 18 U.S.C. 3481 provides: "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such a request shall not create any presumption against him."

The Court in *Chapman* recognizes that defendants are entitled to a trial "free from the pressure of unconstitutional inferences" (*id.* at 26). The Court also acknowledges the impossibility of eliminating all such pressure. The *Raffel* Court says, "We need not close our eyes to the fact that every person accused of crime is under some pressure to testify, lest the jury, despite carefully framed instructions, draw an unfavorable inference from his silence." *Id.* at 499. Consequently, the Court implements the constitutional and statutory privilege by placing a duty on the criminal trial participants to minimize the natural inference of guilt which the jury may draw from failure to testify and deny accusations. The Court in *Griffin* explains the duty and its operation. "What the jury may infer, given no help from the Court, is one thing. What it may infer when the Court solemnizes the silence of the accused against him is quite another." *Griffin, id.* at 614.

The Court defines this *Griffin* protection in its practical application to effect justice. Beginning with the premise that "federal courts are the guardians of the rights guaranteed by the Bill of Rights" (*Chapman, id.* at 21), the Court teaches that a reviewing court may not reverse a conviction on the basis of harmless error which has not contributed to the conviction by any "reasonable possibility" (*Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). The *Chapman* Court establishes that even "before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24.

This Court exercises supervisory power when a defendant has been prejudiced by comments on his exercise of the Fifth Amendment privilege to remain silent. See, e.g., *United States v. Hale*, 422 U.S. 171 (1975); *Grune-*

wald v. United States, 353 U.S. 391, 424 (1957); *Stewart v. United States*, 366 U.S. 1, 5 (1961); *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980). But where a *Griffin* violation is "attenuated" at most, and the appellate court exercised supervisory power to deter the prosecutor's error which was harmless error, the Court explains that appellate supervisory power is an "inappropriate basis for reversal" in *United States v. Hasting*, 461 U.S. 499, 506 (1983). The *Hasting* Court explains the three-fold purposes served by the court's supervisory power are first to remedy the violation of "recognized rights," second, "to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury;" and third, "to deter illegal conduct" (*id.* at 505).

The Court historically reaffirms that both the trial court and the prosecutor have a duty to prevent prejudicing the jury with improper argument. The prosecutor should refrain from improper argument and the trial court should interrupt improper argument with curative measures. See, e.g., *Hall v. United States*, 150 U.S. 71, 81-82 (1893); *N.Y. Central R.R. v. Johnson*, 297 U.S. 310, 318 (1929); *Berger v. United States*, 295 U.S. 78, 84, 88 (1935); *Viereck v. United States*, 318 U.S. 236, 248 (1943); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); and *Young, id.* at 13.

This duty assures that "every litigation [is] fairly and impartially conducted and that verdicts of juries [are] rendered only the issues made by the pleadings and the evidence" (*New York Central R.R., id.* at 318 (citations omitted)); and see *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, 242 (1940). The Court explains that the importance of the prosecutor's duty lies in the prosecutor's authoritative impact on the jury's percep-

tion. The *Young* Court says, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence" (*Young, id.* at 18, 19, citing *Berger, id.* at 88). Especially when misconduct infringes on "specific guarantees of the Bill of Rights . . . this Court [takes] special care to assure that prosecutorial conduct in no way impermissibly infringes on them" (*Donnelly v. De Christoforo*, 416 U.S. 637, 643 (1974)).

When actions or remarks of defense counsel have created for the jury a situation in which an otherwise improper ruling of the trial court or action of the prosecutor does not have a prejudicial impact on the jury, then the Court establishes that appellate remedy is inappropriate or unnecessary, since justice is not impeded. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court shows that when the prosecutor characterized the proof of guilt as uncontradicted, the remark "added nothing to the [jury's] impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense" in opening statement by defense counsel and "told that Lockett would take the stand" (*id.* at 595). The focus is on what impact the action had on jury deliberations.

Similarly, when defense counsel indulges in improper argument and the prosecutor responds in a manner which does not prejudice the jury's deliberations, the Court teaches that appellate remedy is not necessary in the interest of justice. *Young, id.* at 11-12. And see, e.g., *Crompton v. United States*, 138 U.S. 361, 363, 364 (1891); *Lawn v. United States*, 355 U.S. 339, 353-355 (1958).⁴

⁴For example, in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the Court found that the subject matter

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The evidence presented against the respondent was circumstantial. The defense rested on a claim of honest mistake and relied on the government's lack of proof of guilty intention to defraud. It was crucial that the jury comply with the constitutional due process requirement that the government establish every element of the crime beyond a reasonable doubt.⁵ The ruling of the district court came after closing summation of defense counsel. J.A. 25. The prosecutor objected to defense argument as improper and the district court sustained the objection, stating the court's decision on the violation of the Fifth Amendment protection and the application of the invited response rule. J.A. 24, 25. The district court said that the defense counsel "opened the door not less than four times" on the question of the defendant's opportunity to explain. J.A. 25. The district court has a duty to interrupt improper argument. *Hall, id.* at 81, 82; *N.Y. Central R.R., id.* at 318; *Berger, id.* at 84, 88; *Viereck, id.* at 248; and see, e.g., *Caldwell, id.* at 336; *Young, id.* at 13. The court, along with the prosecutor, sat silently through defense argument. Then the court gave the prosecutor permission to tell the jury that "the defendants had every opportunity, if they wanted to, to explain this to the ladies and gentlemen of the jury." J.A. 25. De-

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of the prosecutor's remarks were relevant in this trial on an indictment for violations under the Sherman Act, because the defense theory was that illegal corporate action was justified because the government had acquiesced. Although the prosecutor's argument appealed to class prejudice, there was relevance to the subject matter and the prosecutor's remarks were isolated casual episodes in a long summation and "not reflective of the quality of the argument." *Id.* at 239-242.

⁵*In re Winship*, 397 U.S. 358 (1970), establishes explicitly that the Due Process Clause precludes conviction except upon proof beyond a reasonable doubt of every element of the crime charged.

fense counsel had confined his criticism to the government's lack of pre-indictment questioning on the particular issues which formed the basis of the indictment charges. On appeal, the appellate court said the response should have been confined to stating that the defendant had an opportunity "during the investigation" to "set out his position" (Pet. App. 7a). But the district court sustained the objection of the government and announced his decision *sua sponte* on every ground which the defense counsel might otherwise have made known to the court. J.A. 25.

The prosecutor's rebuttal argument began by emphasizing the authoritative impact of the "imprimatur" of the United States of America referred to by the *Young* Court. *Id.* at 18-19. He stressed the power, obligations and fairness inherent in his position. J.A. 27.

To appreciate the impact of the prosecutor's remarks upon the minds of the jurors, it is essential to note what factors the trial record as a whole shows that the jurors had in their minds at the time the improper remark was presented to them. The jury heard the argument in the context of the evidence peculiar to that particular trial and in the context of questions posed by the evidence itself and relied upon specifically as a defense to the charges. The defense relied on lack of proof of guilty intent to defraud—on honest mistake. The Court has acknowledged that the meaning the jury draws from the arguments of both the defense and the government cannot be accurately determined without careful attention to the major issues the evidence itself has had placed into the minds of the jurors.⁶

⁶*United States v. Hasting*, 461 U.S. 499, 511 (1983) said, "A reviewing court must begin with the reality that the jurors
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Defense counsel characterized the weak evidence of guilty intent as being unfair. He supported each allegation of unfairness by examples from the evidence. J.A. 11-24. One example of unfairness was that the investigator's questions had not indicated that the property claimed as burned was a subject of any interest to them. J.A. 18, 19. The jurors had listened to the tape-recorded questioning sessions. They could decide whether respondent had been made aware of a need to explain which items were listed on the claim form, which were transported to California, which sold at the yard sale, and which destroyed by fire. Only in this context of pre-indictment investigation did counsel refer to defendant's opportunity to explain. Defense counsel argued that the investigator's questions led defendant to believe he was suspected of arson, not of making fraudulent insurance claims. J.A. 18, 19.

When the jurors heard closing arguments, they heard questions posed by defense counsel through cross-examination and witnesses. The record shows one major question was whether respondent's family had made an honest mistake in listing some items of property on their insurance claim form, which, in fact, had not burned—an honest mistake caused by the confusion of having sold some property at a yard sale, having moved other property out of the state, and having left yet other property in the house which burned. Another question posed for their consideration was whether the arson of the respondent's house was committed by an unknown person who caused other unsolved fires occurring within the same time period.

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sat in the same room day after day with the defendants and their lawyers; much testimony had been heard".

New questions were posed in the jurors' minds when the prosecutor spoke from his authoritative position as the United States Attorney. "He could have taken the stand and explained it to you, anything he wanted to." J.A. 27. The new questions posed in the jury's collective mind were a natural extension of the questions on which the defense rested. The questions were if Mr. Robinson has just made an honest mistake, why doesn't he explain it to us? If he knows something about the other arson fires which occurred on the same night in the vicinity, burned property owned by people Mr. Robinson knows and does business with, why doesn't he explain what he knows about them to us?

Until the *Griffin* violation, the trial was based upon an accusatory system of criminal justice. The remark changed the basis to an inquisitional system. The questions the jury had when closing summation began were questions which arose from the evidence and constituted the defense on which the defendant's liberty hung in the balance. The prosecutor's comment that the respondent could have explained himself to the jury, made it irresistible for the jury not to draw an inference of guilt. The comment placed a duty squarely on the respondent to testify, to explain himself, to sort through the profusion of property items and explain to them that he had been mistaken but had suffered a property loss equivalent to or greater than the amount claimed under his insurance contract. The new question was posed in the jury's mind at a point too late for the respondent to testify and meet the new burden of proof placed on the defense.

The context in which the jurors heard the argument is a crucial factor in gauging whether the prosecutor's remark affected their deliberations. The defendant relied on the constitutional requirement that all of the elements

of the crime be proven beyond a reasonable doubt. The prohibition against comment on the defendant's silence, based on the Fifth Amendment, was crucial to the jury's compliance with the constitutionally mandated burden of proof. When the prosecutor called the jurors' attention to the defendant's silence, the natural inference of guilt drawn from silence in the face of accusations became an irresistible inference for the jurors. If the respondent made an honest mistake in the inventory of property, then why didn't he explain? The burden of proof shifted. Significantly, the jury acquitted the defendants on the charges which were based on documents the jury had as exhibits in the jury room. The documents were self-explanatory.

When the concept of competing values or impermissible burdens are weighed by this Court, the facts of the case before it are analyzed by the Court to determine important values of the criminal justice system. For example, in *Tennessee v. Street*, 471 U.S. 409 (1985), the introduction of an accomplice's confession was permissible for the limited purpose of rebuttal despite the fact that the defendant had testified, claiming that his own confession had been coerced and was duplicated after the confession of the accomplice. The truth-finding process of the Confrontation Clause was served by allowing the jury to compare the confessions.

The fact that the *Griffin* violation occurred in this case on rebuttal does not mitigate the prejudice to the jury deliberations, as petitioner suggests. To the contrary, the Court in *Darden v. Wainwright*, 477 U.S. —, 106 S.Ct. 2464 (1986), observed that defense counsel had been able to counter improper argument on defense rebuttal, which contributed to the finding that the trial was not fundamen-

tally unfair in the context of the facts and circumstances of that case.

In *Caldwell*, this Court found the stringent standards for habeas corpus relief from a state conviction were met where the trial judge had openly agreed with the prosecutor's improper remarks. Similarly, in this case, the *Griffin* violation was a violation of the defendant's constitutional right permitted by the court in a case where the evidence was not overwhelming and valid questions posed for the jurors to deliberate were supplanted by encouraging them to draw an irresistible inference of guilt through improper argument which exceeded the bounds of any invitation of defense argument.

The question presented assumes a fact which does not arise from this case. Defense counsel did not argue that the government prevented defendant from explaining. No prevention was even implied. The argument was that in the questioning sessions which the jury heard, there were no questions about the list of property submitted with the insurance claim form through the mail. J.A. 18-19. Not knowing investigators or the government had any interest in the inventory of property the Robinson's had submitted, respondent did not know it would be relevant in allaying their suspicions to offer an explanation during investigation. The jury understood defense counsel's references to the questions asked by the investigators. They could judge for themselves whether such a chance was given. Nowhere does the defense argument imply the defendant was prevented from explaining. Yet on the authority of the United States Attorney they were given to indulge the natural inference that silence, rather than denial, in the face of accusations, is a factor in determining whether the defendant could have offered them a satisfactory explanation on the issue of guilt.

II. THE MEANING AND THE HISTORIC USE OF THE PLAIN ERROR DOCTRINE SHOW THAT ITS APPLICATION TO THIS CASE IS INAPPROPRIATE, THOUGH THE DAMAGE OF THE ERROR RISES TO THE LEVEL OF PLAIN ERROR

The plain error doctrine was defined in early cases which presented a need for the doctrine. The doctrine is a discretionary power of the court exercisable at its option, but particularly applicable where rights of a constitutional nature are asserted. *Weems v. United States*, 217 U.S. 349 (1910). It is applied to correct error not raised in the procedurally mandated manner in matters "absolutely vital to defendants" (*Wiborg v. United States*, 163 U.S. 632 (1896)). It was shaped to promote "respect" and "affection" for the "fairness of the system of trial by jury" (*Crawford v. United States*, 221 U.S. 183, 195 (1909); and see *Clyatt v. United States*, 197 U.S. 207 (1905)). Plain error was corrected under the doctrine regardless of the culpability of the defendant. *Clyatt, id.* at 222. See, e.g., *Screws v. United States*, 325 U.S. 9, 107 (1945)).

The early *Wiborg* decision (*id.* at 632), was restated in Fed. R. Crim. P. 52(b), which provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The Court acted in the public interest to find and remedy plain error where counsel has failed to note an exception under former rules of procedure. See, e.g., *N.Y. Central R.R. v. Johnson*, 279 U.S. 310, 318 (1929); *Brasfield v. United States*, 272 U.S. 448 (1926); and *United States v. Atkinson*, 297 U.S. 157 (1936).

The decisions cited above emphasize this doctrine grows out of concern for preserving justice, maintaining judicial integrity and promoting public respect for the justice system. These concerns outweigh needs for strict

observance of procedural rules requiring objections to be voiced and exceptions to be noted to preserve error for appellate review.

This Court, in 1944, prescribed the Federal Rules of Criminal Procedure for The District Courts of the United States. The plain error doctrine was preserved under Rule 52(b), though all former requirements for exceptions were abrogated. Rule 51 offered a suggested alternative to the former need for exceptions which would be sufficient to preserve error for appellate review. However, the rule does not propose by its language that the "sufficient" alternative set out is, in fact, the sole, exclusive manner of preserving error.⁷

Further, no language in the two rules draws a strict technical relationship between the plain error doctrine and the "sufficient" alternative to the unnecessary noting of exceptions set out in Rule 51. The Court has not specifically construed the word "sufficient" in the context of the two rules or delineated the relationships to be drawn between the two rules read together, although procedural technicalities associated with the meaning of Rule 51 have come to be implied in the Court's application of the plain error rule. However, the Court does explain the needs served by these two procedural rules.

The Court in *Atkinson*, considering the plain error doctrine, teaches that exceptions and objections are needed so the trial judge has an opportunity to rule on an objection

⁷Rule 51 provides: "Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him." Fed. R. Crim. P. (emphasis added).

and the grounds on which it is based before appellate review for correction of error. *Id.* at 159. This decision was handed down eight years before the federal rules of procedure were prescribed, in the former climate of the more elaborate system of technical requirements associated with the necessity for exceptions. Yet the *Atkinson* Court reflects that the underlying purpose in the exception requirement is to assure that only matters which the trial court had an opportunity to rule on will be considered in appellate review. "The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court" (*id.* at 159). The Court clearly states the rationale. "This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact" (*Ibid.*, citations omitted). The Court in *Young*, *id.* at 16, 17, looked to the *Atkinson* decision and rationale in considering the application of the plain error rule.

Detection is an essential factor in denying the remedy of the plain error doctrine. Detecting the error during trial so the trial court can cure it is a crucial consideration in exercising the discretionary plain error doctrine. Detecting the error contemporaneously with its commission is the requirement that the adversely affected party has failed to meet when the plain error rule is at issue. In discussing the purpose of Rule 52(b), the Court in *United States v. Frady*, 456 U.S. 152, 163 (1982), explains that plain error is error which is so plainly erroneous that even "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it."⁸ The balanced interests the Court weighs

⁸The Court in *Davis v. United States*, 411 U.S. 233, 253 (1973), expressed the underlying concern with procedural de-
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are the efficiency of "encouraging trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed" (*Ibid.*). In the case of this respondent's defense counsel, there was no failure of the trial judge, the prosecutor or the defense counsel in detecting the error or the grounds. J.A. 25. The error consists of two actions. The judge ruled in advance permitting the *Griffin* error and the *Griffin* error prejudiced the jury. J.A. 25, 27. The ruling was made in full consideration of the grounds later asserted on appeal. *Id.* at 25.

The *Atkinson* decision is cited with approval in more recent decisions, most notably in *Young*, *id.* at 16, 17. *Young* implies a rigid construction to Rule 51 when the Court characterizes Rule 52(b) as the rule which "tempers the blow of a rigid application of the contemporaneous objection requirement" (*id.* at 15).

The *Young* Court indirectly applies a rule referred to as the collateral objection rule, citing Rule 52(b) as an exception to it, but omits to cite and account for its companion, Rule 51. *Ibid.* The two rules together seem to establish fully the plain error exception to the collateral objection rule.

Few majority decisions of this Court have specifically referred to Rule 51 in and of itself. See, e.g., *United States v. Sheridan*, 329 U.S. 379, 393 (1946).⁹ In another decision

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faults saying, "Providing the opportunity to raise . . . claims at any point in the process, so long as the offender did not willingly conceal them for strategic reasons, helps guarantee that the process of criminal justice is fair and does so without benefitting someone who was delinquent in his attempts to preserve the fairness of the process."

⁹The *Sheridan* Court states, "Bills of exception are abolished," and cites every new procedural rule which effects the

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a dissenting opinion offers a simple explanation of the operation and effect of Rule 51. That insight is supplied by Mr. Justice Douglas in drawing a comparison between the operation and effect of civil and criminal rules of procedure, in *Williams v. Zuckert*, 371 U.S. 531, 536 (1963) (dissenting). Significantly, Mr. Justice Douglas dissented to the majority opinion, later vacated by the Court (at 372 U.S. 765 (1963)),¹⁰ because in effect the petitioner's constitutional confrontation right was denied due to petitioner's non-timely request to cross-examine witnesses under an administrative regulation. *Id.* at 533-536. Mr. Justice Douglas compared the petitioner's lost civil claim to the loss of liberty, observing that the loss of a constitutional right of confrontation is a great loss, and that such a great loss over a minor technicality of law would never happen under the rules of criminal procedure, because of Rule 51. *Ibid.*¹¹

There is a gap between fact situations suggested by Rule 51 and facts suggested by Rule 52(b). The facts in this case demonstrate this gap. The gap applies where the

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elimination of exception. Only Rule 51 remains, entitled "Exceptions Unnecessary," with a suggestion of what suffices in lieu of exceptions and a flexible exception to that suggested replacement where "a party has no opportunity to object to a ruling." Rule 51, F. R. Crim. P. 18 U.S.C.

¹⁰The reconsidered majority opinion reflects acknowledgment of the less rigid application of technical requirement, the position urged in Mr. Justice Douglas' earlier dissent at 571 U.S. 531, 533-536.

¹¹"We should not saddle these administrative proceedings with strict formalities concerning the manner in which exceptions or objections are made. They have no place in criminal proceedings, as Rule 51 of the Federal Rules makes clear; and it is unhealthy to let them take root in administrative hearings where human rights are involved that are precious to 'liberty,' within the meaning of the Fifth Amendment, as a person's right not to be fined or imprisoned unless prescribed procedures are followed." *Id.* at 536.

error falls outside of Rule 52(b) because it was brought to the attention of the trial court, giving the trial court the opportunity to rule on the error prior to appellate review as suggested by the *Atkinson* Court, (*id.* at 159).¹² And the error falls outside of the scope of the spirit of Rule 51, because the error and grounds later appealed were made known to the trial court. Rule 51 states that a sufficient alternative to exceptions is to make error and grounds known to the trial court when counsel has the opportunity to do so. The focus is on assuring that the error and grounds are known to the trial court. Again, the *Atkinson* Court's explanation for a purpose of exceptions is suggested by this rule, to give the trial court the opportunity to correct error before appellate review. *Atkinson, id.* at 159. But the error and grounds appealed were made known to the trial court in this case, though by a means other than that suggested as sufficient in Rule 51. J.A. 25.

Respondent appealed the court's ruling on the same grounds considered by the district court in arriving at the ruling. The district court considered the Fifth Amendment in its prohibition against commenting on defendant's election not to explain himself by testifying, considered

¹²The focus is on obtaining a contemporaneous ruling on an error from the trial court. In *Crompton v. United States*, 138 U.S. 361, 364 (1891), the Court says, "it is the duty of the defendant's counsel at once to call the attention of the court to the objectionable remarks, and request its interposition, and, in case of refusal, to note an exception." And in *United States v. Secony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the Court cites the *Crompton* Court, *id.*, explaining that defense counsel "cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that . . . comments to the jury were improper and prejudicial" (*id.* at 238, 239) (emphasis added). This passage is quoted in *Young* with approval. *Id.* at 16, n. 13. The thrust is on failure of having the objectionable matter and grounds known by the trial court. The contemporaneous objection appellation might more accurately be called the contemporaneous ruling requirement.

the application of the invited response doctrine, and ruled. J.A.25. The respondent appealed the ruling on the basis of the same Fifth Amendment prohibition and the application of the invited response doctrine. Rule 51 was complied with, since the potential error in the court's ruling was considered by the trial judge and decided upon, although the judge himself, not the party adversely affected, "made known" the potential objection and grounds.

If a plain error issue arises in this set of facts, then it arises by extending the meaning of Rule 52(b) to encompass a narrow technical construction to Rule 51, regardless of the flexibility suggested by the last phrase in Rule 51. Rule 52(b) would then apply not only to "matters not brought to the attention of the court," but also to matters brought to the attention of the court but not brought by the appropriately designated party suggested in Rule 51, even though the trial court in this case fully utilized the opportunity to consider the grounds on which the ruling might be found to be erroneous and acknowledged the possibility of reversible error. J.A. 25.

The prosecutor made an objection based on improper argument when he said, "Several things in that argument I took quite a bit of offense to. . . . Mr. Durham, I think, has stepped beyond the bounds of good argument" (J.A. 24, 25). The court ruled on the prosecutor's objection immediately, stating the court's decision upon every issue of law and fact which the defense attorney might otherwise have brought to the court's attention. Further action of defense counsel would have been procedurally unnecessary. The court heard an objection, sustained the objection, and specifically stated an emphatic decision on every objection and ground of law which the counsel for defense might otherwise have made known to the Court. J.A. 25. Further action of defense counsel would have been to note an ex-

ception or to re-argue his summation. Rule 51 provides that exceptions are unnecessary. Does the rule require an advocate to petition the trial judge to reconsider each ruling unfavorable to the defense counsel or else lose any right of appeal on the unfavorable ruling? Even when exceptions were necessary, *Atkinson, supra*, explains that the necessity for exceptions, in part, is in fairness to the trial court. *Id.* at 159. And in *Frady*, the Court focuses on detecting the error, not on setting up a rigid technicality when the error is considered and ruled upon. *Id.* at 163. Similarly, Rule 51 assures that the trial court is provided an opportunity to consider the grounds on which a ruling might later be urged as error. As long as the error on appeal is raised on the same grounds considered by the trial court, the substantial concerns articulated by the Court in case law and in Rule 51 have been met. It is stated in Rule 51 and widely relied upon that exceptions are no longer necessary to preserve appeal rights.

The plain error standard applies to errors not brought to the trial court's attention. In the present case, if the plain error standard is applied to the error reviewed, then the plain error test will be applicable to any rulings which the adversely affected party has not excepted to, even to error brought to the court's attention.

The matters appealed had been considered and ruled upon by the district court. The necessity for exception is reinstated if the plain error standard must be met in this case. This will seat the plain error doctrine in a family of rigid technical requirements the doctrine was originally shaped to rise above.¹³ It has been used repeatedly by this

¹³It is well established that appellate remedy is not always lost by failure to particularize error by exceptions or objections. *Young, id.* at 15; *Frady, id.* at 163, n.13; *New York Central R.R. id.* at 318; *Brasfield, id.* at 450; *Wiborg, id.* at 658; *Clyatt, id.* at 220; *Crawford, id.* at 194; *Weems, id.* at 362.

Court as a counterbalance to technical procedural rules in the greater interests of maintaining the system of justice established by the Constitution as a real and viable basis for all trials in the federal courts. To circumscribe the plain error doctrine with procedural limitations, extending Rule 52(b) to matters brought before the trial court but not in accordance with a rigid reading of Rule 51, would only serve to eliminate this discretionary, flexible plain error doctrine which has been used historically to fulfill the Constitution.

The question presented by the petitioner is whether the plain error doctrine applies to constitutional issues. The decisions developing the doctrine define the doctrine in its very application to cases where the defendant has been deprived of liberty through a failure to give operation to a right provided by the Constitution because of errors which plainly arise upon a review of the record and call for the Court's appellate remedy.

A review of the plain errors remedied by the Court show the errors were plainly within the scope of the Constitution's protection. This Court found plain error in the trial record showing no proof was offered to establish one of the elements in the indictment charged in *Wiborg*, *supra*, and in *Clyatt*, *supra*. In both of these decisions the Court corrected error which had deprived the defendant of the right to be informed of the nature and cause of the accusation, a guarantee of protection provided by the Sixth Amendment. The errors had also interfered with the right to due process of law provided by the Fifth Amendment, which this Court later explicitly defined as a prohibition against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358 (1970).

The *Crawford* Court reversed the verdict where one of the jurors should have been excused because he was an employee of the federal government, thus presumed to be biased under the common law. This error had violated the right to an impartial jury provided by the Sixth Amendment.

The *Weems* Court found plain error in the Eighth Amendment violation of the defendant's right not to be sentenced to cruel and unusual punishment. The Court indicates in the *Weems* decision that this Court will act under the plain error doctrine especially when constitutional rights are asserted.

This Court found plain error which was *per se* reversible when the district court asked the jurors the nature or extent of their division during deliberations. The Court found the question is coercive, in *Brasfield*, *supra*. Correcting this error protected the right to an impartial jury required by the Sixth Amendment and the right to due process of law under the Fifth Amendment.

In *New York Central R.R.*, *supra*, plain error was found in the improper prejudicial argument of counsel and in the failure of the trial judge to sustain objection to the argument. There, the Court discussed the duty of the trial court and counsel to uphold the interest of the judiciary by assuring that "every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence" (*id.* at 318). The error had affected the right to a fair trial under the Due Process Clause of the Fifth Amendment and the right to an impartial jury provided by the Sixth Amendment.

The Court allowed defendants to have their plea of *nolo contendere* set aside and to defend against the indictment where justice required the action under the plain

error doctrine in *United Brotherhood of Carpenters v. United States*, 330 U.S. 395 (1947). The Fifth Amendment right to due process of law was thus served, as well as the right to trial by jury guaranteed by the Sixth Amendment and by Article III, Section 2, Clause 3 of the Constitution.

The Court in *Silber v. United States*, 370 U.S. 717 (1962), found plain error not presented for review in the district court's denial of defendant's motion to dismiss a faulty indictment identical to indictments held to be faulty in *Russell v. United States*, 369 U.S. 749 (1962). This decision implies the right to be informed of the nature and cause of the accusation provided by the Sixth Amendment. Again, this Court applied the plain error discretionary power in correcting the constitutional error occurring when the district court had added one day to the defendant's sentence out of the presence of the defendant. *Bartone v. United States*, 375 U.S. 52 (1963). The Confrontation Clause of the Sixth Amendment was served, as defined by *Rogers v. United States*, 422 U.S. 35 (1975), in which case this Court established the defendant's right to be present at every stage of the proceeding. The *Rogers* Court also corrected plain error which had deprived defendant of his right under the Confrontation Clause.

The plain error doctrine gives the Court discretionary power to notice plain errors which "seriously affect the fairness, integrity or public reputation of the judicial proceedings" (*Atkinson, id.* at 160). Since the Constitution incorporates safeguards which encompass all stages of a prosecution, it is difficult to conceive of many plain errors affecting this fairness, integrity, or reputation which do not invoke a safeguard of the Constitution.¹⁴ This Court

¹⁴The Court in *Hasting* observed the "myriad safeguards provided to assure a fair trial" in the Constitution, the "reality

(Continued on following page)

explicitly equates fairness with the Constitution, stating that a "fair trial is this country's constitutional goal" (*Pointer v. Texas*, 380 U.S. 400, 405 (1965) (emphasis added)).

Even if the Court expands the plain error doctrine to include errors not raised in compliance with a rigid reading of Rule 51, the error of the district court's ruling in this case rises to the level of plain error set out by this Court. The error injected into the jury deliberations an inference drawn from the defendant's failure to explain the circumstantial evidence by testifying. This inference was not valid as evidence to be considered in deliberation. The inference was not capable of cure by defendant's testimony occurring at that rebuttal phase of the trial. The inference was not capable of cross-examination under the Confrontation Clause. It refocused the burden of proof in violation of the Due Process Clause.¹⁵

The question presented is whether plain error applies to constitutional error. In the case before this Court, the appellate decision under review drew no relationship between plain error and constitutional error. What the court observed was, "[b]ecause the prosecutorial misconduct in this case constitutes constitutional error, we may notice such error more freely" (Pet. App. 8a, emphasis added). The appellate court observed that this Court distinguishes "prosecutorial misconduct involving prosecutor's personal

(Continued from previous page)

of the human participants," and the fact that the Constitution does not guarantee a perfect trial, in discussing the Court's finding that not all constitutional error is *per se* reversible error. *Id.* at 509. And see, e.g., *Chapman v. California*, 386 U.S. 17 (1967).

¹⁵The full burden of proof is solely on the prosecution as guaranteed by the Due Process Clause of the Fifth Amendment of the Constitution, as explicitly established by this Court in *In Re Winship*, 397 U.S. 358 (1970).

attacks on defendant from arguments implicating specific constitutional rights such as the defendant's right to remain silent" (Pet. App. 8a-9a, citations omitted).¹⁶

The decision of the court of appeals under review correctly followed this Court tests explained in *Young*. Applying the test announced in the *Young* decision, to the case before it, the court reaffirmed because under the *Young* test, the misconduct in this case "'undermine[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of justice'" (Pet. App. 9a, quoting *Young*, at 17). The court of appeals also found that the error rises to the level of plain error because the plain rule operates "upon errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" (Pet. App. 7a, quoting *Atkinson*, *id.* at 160). Thus, though the court reaffirmed its prior decision upon the application of the *Young* test, the court further based its decision on its duty to preserve the fairness, integrity, and reputation of judicial proceedings.

Following the approach recommended as essential by this Court in *Young*, *id.* at 16, the appellate decision evaluated the error in the context of the entire record. Pet. App. 9a. An analysis of the crucial factors in the record viewed from the appellate court's perspective demonstrates the plain error remedy was applied according to standards announced by this Court.

The appellate court found the prosecutor and district court should have confined the prosecutor's response to stating that the government had been fair and that the defendant had an opportunity "during the investigation" to

¹⁶In *Donnelly v. DeChristoforo*, this Court says, "When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial misconduct in no way impermissibly infringes them." 416 U.S. 637, 643 (1974).

"set out his position" and had presented evidence to establish guilt. Pet. App. 7a. The court found the plain error standard was met because the prosecutor's response "exceeded what was necessary to protect the government's interest and was itself suggested by the court" (Pet. App. 9a).¹⁷

The court applied the *Young* test in considering the impact of the district court's ruling and subsequent *Griffin* error on the jury's ability to judge the evidence fairly. Pet. App. 9a. Context is crucial in measuring the impact of error on the minds of the jurors under the tests both for judging whether error is plain error and in judging whether prosecutorial comments damaged the defendant to the extent of prejudicing their deliberations and injecting into their verdict factors which were outside of the evidence lawfully presented for their consideration. The trial record as a whole must be taken into consideration in determining the extent of the damage to the fairness of the verdict. *Socony-Vacuum Oil Co.*, *id.* at 239, 242; *DeChristoforo*, *id.* at 646-647 (focusing on the meaning the jury will infer from the prosecutor's remark); *New York Central R.R.*, *id.* at 318; *Young*, *id.* at 12, 16.

Applying the test of the weight of evidence of guilt in gauging whether the prosecutor's remark operated to prejudice the jury's deliberation and to infect its verdict with matters other than the evidence presented, the appellate court correctly found that in this case the evidence of guilt was not overwhelming, the error seriously affected the "fairness, integrity or public reputation of judicial proceedings" (Pet. App. 7a), "jeopardized the fairness of the trial" (Pet. App. 8a), violated a "substantial consti-

¹⁷The appellate court says an ample response of prosecutor to defense argument would have been that the defendant was "given the opportunity throughout the investigation to explain his position" (Pet. App. 6a).

tutional right" (Pet. App. 8a), and "probably impacted adversely on the jury's deliberations." Pet. App. 8a.¹⁸

It is a grave disservice to the historic tradition of the plain error doctrine to limit, proscribe, and attempt finely to define the doctrine. Review of an appellate court's exercise of the doctrine can be conducted with the strongest presumption of the soundness of the lower court's judgment. Like remedies sounding in equity, the doctrine clearly emerged to supply a just remedy despite the unavailability of a currently perfected judicial fine rule of law to suit the unique characteristics of any given case under review.¹⁹ The remedy of the plain error doctrine can be trusted in the hands of the judiciary to assure the scrupulous preservation of justice, judicial integrity and public respect for the judicial system.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,
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¹⁸In *Berger*, this Court considered probability in terms of surmising the prejudicial impact of error. "[P]rejudice to the accused is so highly probable that we are not justified in assuming its non-existence. If the . . . evidence of . . . guilt [were] overwhelming, a different conclusion might be reached" *id.* at 89.

¹⁹For example, although in 1906 the *Clyatt* Court reversed a conviction where prosecution had not proven all elements of the crime charged, it was not until 1970 that the Court explicitly announced that the Due Process Clause requires that every element of the crime charged be proven beyond a reasonable doubt in any valid conviction. *In re Winship*, 397 U.S. 358 (1970).

REPLY BRIEF

①
No. 86-937

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In the Supreme Court of the United States
OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS O. ROBINSON, JR.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

REPLY MEMORANDUM FOR THE UNITED STATES

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In our opening brief, we contended that the court of appeals' judgment reversing respondent's convictions was flawed in two respects. First, the court of appeals misconstrued this Court's decision in *Griffin v. California*, 380 U.S. 609 (1965), and it did so in a fashion symptomatic of the wider confusion among the lower federal courts about the scope of the *Griffin* rule. Second, the court of appeals misapplied the "plain error" doctrine, holding that courts are freer to overlook a failure to object at trial where the error in issue implicates constitutional rights.

1. Respondent shares our view that the rule in *Griffin* does not forbid every comment pertaining to a defendant's failure to testify, but only those comments that "solemnize[] the silence of the accused into evidence against him" (Resp. Br. 27 (quoting *Griffin*, 380 U.S. at 614)). Respondent likewise agrees that a prosecutor must have leeway to respond in rebuttal "when defense counsel indulges in improper argument" (Resp. Br. 29). And respondent does not dispute the general proposition that arguments or other trial procedures are not constitutionally infirm simply because they place some burden on a defendant's exercise of his right not to testify.

Respondent argues, however, that the prosecutor's rebuttal in this case was improper because it was not warranted by defense counsel's summation. According to respondent, defense counsel "confined his criticism" to the government's purported failure, during its "pre-indictment questioning," to afford respondent a chance to answer "questions about the list of property [that respondent] submitted with the insurance claim form through the mail" (Resp. Br. 31, 35). In respondent's view, counsel did not argue that the government had prevented respondent from telling his side of the story to the jury (*id.* at 35). Thus, he reasons, the trial court violated the rule in *Griffin* by permitting the prosecutor to respond as he did.

But respondent's account does not explain the words his counsel actually used in summation (Tr. 671; J.A. 19):

Now, would you like to get indicted for that, without the Government being fair, and being able to explain, have him explain before you, members of your own community, rather than before the agents?

These remarks cannot plausibly be understood simply to mean that the investigators, during the pre-indictment proceedings, denied respondent a chance to confront all of the evidence against him. Respondent apparently recognizes as much, for he suggests (Resp. Br. 15) that in making this statement "[c]ounsel stressed the unfairness of not giving the respondent an opportunity to explain to the investigators first, rather than requiring him to explain it before a jury." This more elaborate explanation, however, is equally unfaithful to defense counsel's actual language; certainly, neither the trial court nor the prosecutor construed the summation in that way. And defense counsel failed to offer this (or any other) account of the summation at a time when the trial court could have acted on it.

2. Respondent defends the court of appeals' plain error analysis on three grounds. He argues, first, that the plain error doctrine is not applicable at all, since even without an objection by counsel, "there was no failure of the trial judge * * * in detecting the error" in the prosecutor's rebuttal (Resp. Br. 39). Second, respondent agrees with the court of appeals (*id.* at 44-47) that the plain error rule should be more leniently applied when the error in question implicates constitutional rights. Finally, respondent asserts (*id.* at 47-50) that the prosecutor's rebuttal constituted plain error and was properly noticed by the court of appeals, despite the absence of a contemporaneous objection. Each of these contentions falls short of the mark.

a. It is true, as respondent notes, that even without an objection "[t]he district court considered the Fifth Amendment" (Resp. Br. 41) when it ruled that the prosecutor could respond to counsel's re-

marks. But it is not enough that a trial court is generally aware of possible objections that might be raised to a particular evidentiary ruling. In this case, because defense counsel failed to make a contemporaneous objection, the court had no idea whether counsel actually opposed the prosecutor's proposed rebuttal. Nor could the trial court consider counsel's conflicting interpretation of his summation remarks. Had defense counsel wished to rely on that alternative explanation, he had a duty to make it known to the court.¹

b. Respondent does not dispute this Court's observation in *Yakus v. United States*, 321 U.S. 414, 444 (1944), that "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before the tribunal having jurisdiction to determine it." And respondent offers no reason why the plain error rule should be applied more leniently

¹ Respondent relies heavily (see Resp. Br. 24, 37, 39-44, 47) on Fed. R. Crim. P. 51 for the surprising proposition that a contemporaneous objection is not the only way to preserve an issue for appeal. Rule 51 makes it unnecessary to lodge an exception to a ruling in order to preserve the issue. But the rule clearly provides that in place of an exception "a party, at the time the ruling or order of the court is made or sought, [must] make[] known to the court the action which * * * [he] desires the court to take or * * * [his] objection to the action of the court and the grounds therefor * * *." Moreover, there is nothing "flexible" (Resp. Br. 39-40 n.9) about this requirement. Indeed, Rule 51 by its terms excuses a party from making an objection only when the party "has no opportunity to object." Respondent does not suggest that he was somehow denied a chance to make his views known to the trial judge. See *Estelle v. Williams*, 425 U.S. 501, 509-513 (1976).

when constitutional claims are involved. Indeed, that has not been the Court's practice. In *Estelle v. Williams*, 425 U.S. 501 (1976), for example, the Court agreed with the defendant that under the Fourteenth Amendment he should not have been required to stand trial in prison garb. Nevertheless, because defense counsel had raised no objection at trial to the practice, the Court refused to reverse the defendant's conviction. While reluctant to find a "relinquishment of a fundamental right * * * absent a showing of a conscious surrender of a known right" (*id.* at 508 n.3), the Court explained (*ibid.*) that it "has not * * * engaged in this exacting analysis with respect to strategic and tactical decisions, even those with constitutional implications, by a counseled accused." Quoting the Second Circuit's decision in *United States v. Indiviglio*, 352 F.2d 276, 280 (1965), cert. denied, 383 U.S. 907 (1966), the Court observed (*ibid.*) that "[f]ederal courts, including the Supreme Court, have declined to notice [alleged] errors not objected to below even though such errors involve a criminal defendant's constitutional rights." And the Court noted (425 U.S. at 508 n.3) that "[t]he reason for this rule is clear: if the defendant has an objection, there is an obligation to call the matter to the court's attention so the trial judge will have an opportunity to remedy the situation." See also *id.* at 513-515 (Powell, J., concurring).²

² Respondent suggests (Resp. Br. 44-47) that in each case in which this Court has noticed a plain error, the error was of constitutional dimension. None of the cited cases, however, described the relevant error in constitutional terms. Indeed, only by recharacterizing the cases in "fair trial" or "due process" terms is respondent able to attach a constitutional label to each of the various errors in the cases.

c. Respondent offers no support for his contention (Resp. Br. 47-50) that the prosecutor's summation in this case constituted plain error in the required sense: a "particularly egregious error" that "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings" (*United States v. Young*, 470 U.S. 1, 15 (1985) (citations omitted)).³ Respondent suggests (Resp. Br. 49) that "the evidence of guilt was not overwhelming"; but, as our statement of facts shows, the proof at trial was extraordinarily strong. It is hard to imagine a stronger circumstantial case than this one.

There is no more force to respondent's contention (Resp. Br. 24) that the rebuttal "was crucial in this case [because] the defense rest[ed] on the failure of the prosecution to establish guilt beyond a reasonable doubt on each element of the crime charged." That is essentially the defense in every criminal case.

Finally, respondent provides no support for his extravagant claim (Resp. Br. at 33) that until the prosecutor's remarks, "the trial [had been] based upon an accusatory system of criminal justice" but that "[t]he remark changed the basis to an inquisitorial system." It is not clear what that characterization is meant to suggest. In any event, if there were any dramatic change in the character of the trial at the point of the prosecutor's remarks, it apparently was too subtle to attract the notice of defense counsel at the time.

³ "The plain error doctrine * * * does not permit us to consider the ordinary backfires—whether or not harmful to a litigant's cause—which may mar a trial record. The doctrine focuses our attention only on blockbusters: those errors so shocking that they seriously affect the fundamental fairness and basic integrity of the proceedings conducted below." *United States v. Griffin*, 818 F.2d 97, 100 (1st Cir. 1987).

For the foregoing reasons, and the reasons set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

CHARLES FRIED
Solicitor General

SEPTEMBER 1987